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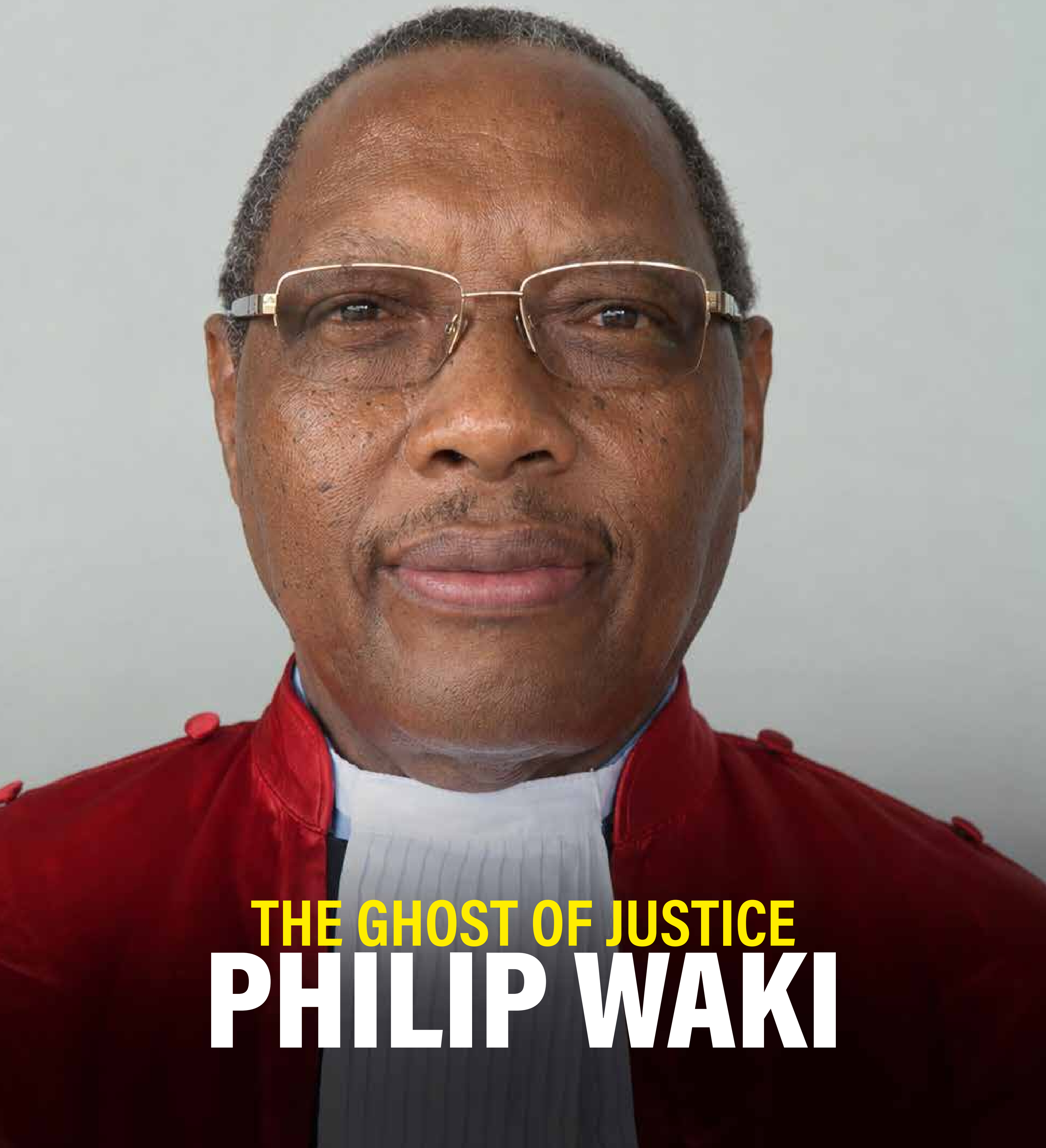

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EDITORIAL

Kenya cannot be governed by goons

The violence in Homa Bay is not an isolated political disturbance. It is another grisly instalment in a national story that is becoming increasingly difficult to disguise, rationalise or explain away. On Sunday, violence surrounding the Linda Mwananchi rally in Homa Bay left two people dead and 46 injured. Four people reportedly suffered gunshot wounds; several others sustained deep panga cuts; at least six vehicles were torched; journalists were assaulted; media equipment was vandalised; and even religious premises were invaded and damaged. Seventeen people were arrested, according to the police.

This is not politics. It is the organised degradation of the Republic.

And it is happening with frightening regularity.

Kenyans have been here before. We know where political violence leads. We know what begins with hired youths, stones, clubs and burning vehicles can end in bloodshed on a scale that a nation spends decades trying to comprehend. We also know the poisonous political logic behind it: intimidate the opponent, frighten the voter, silence the critic, attack the journalist, disrupt the meeting and then retreat behind the convenient fiction that these were merely "youths" who acted spontaneously.

That fiction must end.

The deeper concern is constitutional. Kenya guarantees freedoms of expression, association, peaceful assembly, demonstration and political participation. When organised groups use violence or intimidation to prevent citizens from exercising those rights, the issue goes beyond ordinary criminality: it threatens democratic participation and the rule of law.

The violence goes on unabated, whether through the express participation of elements within the State or through the tacit condonation of violence by officials who have the constitutional power and institutional responsibility to stop it. Either explanation is intolerable. A State that organises violence is culpable. A State that knowingly permits political violence to flourish is equally culpable. A State that repeatedly witnesses attacks, receives warnings, issues condemnations and then does nothing meaningful to dismantle the

machinery of violence is not merely failing; it is normalising impunity.
Homa Bay therefore cannot be treated as another unfortunate entry in the daily news cycle.

The evidence of a widening pattern is already before us. During the recent Ol Kalou by-election, the Kenya National Commission on Human Rights documented reports of organised attacks by hired gangs, voter intimidation, gunshots, destruction of campaign materials and allegations of misuse of State resources. Amnesty International Kenya went further, describing the deployment of armed, masked gunmen in unmarked vehicles and documenting attacks on journalists and voters. The Kenya Human Rights Commission (KHRC) subsequently reported a death, injuries, attacks on journalists, robbery, destruction of property and other serious violations during the poll. So what exactly are we supposed to call this?

A coincidence?

A series of unrelated youthful exuberances?

Political passion?

No. It is a pattern.

And patterns, particularly patterns involving violence, intimidation and impunity, demand political accountability.

The pattern has since become harder to dismiss. On Saturday, 29 August, Siaya Governor James Orengo was attacked during a Linda Mwananchi political engagement in Migori. Tear gas was deployed as the rally was underway, forcing Orengo and his entourage to flee, and a vehicle in his convoy was subsequently torched in Awendo. Orengo has alleged that live bullets were fired at his vehicle and has described the incident as an assassination attempt.

Whatever the ultimate findings of an impartial investigation, the political significance is unmistakable: a senior elected official cannot participate in a public political meeting and leave with his vehicle burning behind him. And the following day, the same movement's rally in Makutano, Meru, was disrupted when tear gas was lobbed into the gathering attended by Nairobi Senator Edwin Sifuna and other opposition leaders. These are not isolated incidents when placed alongside Homa Bay and Ol Kalou. They begin to look like a method.

What should concern Kenyans most is not merely the identity of the individuals throwing stones, firing shots, wielding pangas or hurling tear gas. It is the ecosystem that makes such violence possible. Political thuggery becomes particularly dangerous when perpetrators come to believe that the State will not seriously investigate them, that the police will look the other way, that evidence will disappear, that victims will be blamed for provoking their attackers and that political patrons will provide protection. That is how violence ceases to be random criminality and becomes an instrument of political administration. The question therefore is not simply, "Who are the goons?" It is: who recruits them, who finances them, who equips them, who directs them, who protects them and who ensures that they are never held accountable?

History offers a particularly chilling warning. Under François "Papa Doc" Duvalier in Haiti, the regime developed the feared Tonton Macoute militia as an instrument for intimidating and suppressing political opponents. A US State Department historical account described the group as consisting of Duvalier loyalists, including militia members and former criminals, who enjoyed extraordinary freedom from interference or punishment and functioned, in effect, as a political instrument of coercion. The lesson is not that Kenya is Haiti, nor that every Kenyan youth involved in political violence is a Tonton Macoute. The lesson is more fundamental: when political power begins to rely upon unofficial violence, the distinction between the State and the gang begins to collapse. The goon becomes useful precisely because he can do what the State officially cannot admit to doing, intimidate, assault, destroy and terrorise, while the political establishment maintains plausible deniability.

That is the road Kenya must refuse to travel. A constitutional democracy cannot outsource political coercion to gangs and then pretend that constitutional government remains intact. The danger is greatest when violence is alternately perpetrated by shadowy actors and enabled by official inaction, because each episode lowers the political cost of the next. Homa Bay, Ol Kalou, Migori and Meru should therefore be treated not as separate security incidents but as warning lights on the same dashboard. The State must investigate every attack, identify those who planned, financed and executed it, and prosecute them irrespective of political affiliation. Otherwise, Kenya risks creating its own version of the logic that has scarred other states: elections in which citizens are formally free to vote, but politically powerful actors are equally free to decide who may campaign, who may speak, where meetings may be held and how much violence an opponent must endure before giving up. Kenya cannot be governed by goons, and a government that permits goons to govern political space ultimately ceases to govern by the Constitution.

The assault on civic space makes the picture even more disturbing. Civil society organisations such as the Kenya Human Rights Commission and The Institute for Social Accountability have themselves become targets. In June, a post-budget dialogue at All Saints Cathedral involving civil society organisations was violently disrupted by suspected goons. TISA was among the organisations involved. Civil society groups subsequently reported surveillance, harassment and an attempted raid at TISA's offices, while KHRC has documented earlier attacks against its own personnel and activities. This is the point at which every Kenyan should become deeply alarmed.

When political opponents are attacked, democracy is threatened.

When journalists are attacked, democracy is threatened.

When civil society organisations are attacked, democracy is threatened.

When citizens are prevented from gathering peacefully, democracy is threatened.

When watchdogs are intimidated because they scrutinise public expenditure, democracy is threatened.

And when those responsible for protecting the constitutional order appear incapable, or unwilling, to protect these people, the danger moves beyond individual violations. It becomes a crisis of the State itself.

A government cannot simultaneously proclaim its commitment to the rule of law and preside over an environment in which masked men, hired goons and political gangs operate with apparent confidence that nobody will hold them to account.

It cannot invoke the Constitution when convenient and ignore its most fundamental obligations when politically inconvenient.

It cannot demand obedience from citizens while allowing political actors and their proxies to behave as though the criminal law applies only to ordinary Kenyans.

And it certainly cannot run a country like this. Kenya is a constitutional republic, not a political fiefdom. Public office is a trust. The coercive power of the State is not the private property of whoever happens to occupy the State House, command a police formation, control a county political machine or enjoy proximity to political power.

The National Police Service exists to protect life and property, uphold the law and respect human rights. It does not exist to provide political muscle. The Directorate of Criminal Investigations exists to investigate crime, not to shield politically connected perpetrators. The Office of the Director of Public Prosecutions exists to prosecute offences independently and impartially, not to wait for political winds to determine which cases deserve oxygen.

The Independent Policing Oversight Authority exists precisely because policing cannot be left to police itself. The Independent Electoral and Boundaries Commission exists to safeguard the electoral process. Parliament has an oversight responsibility. The judiciary remains the ultimate constitutional forum where rights are violated and institutions fail.

These institutions must now earn the constitutional mandates for which they exist.

The Inspector-General of Police must act. The National Police Service must identify those responsible for the Homa Bay violence, establish who planned and financed the attacks, determine why armed groups were able to blockade roads and attack people and property, and explain the deployment and conduct of police officers before, during and after the violence.

The Director of Criminal Investigations must investigate the organisers, financiers and commanders of political gangs, not merely arrest a handful of young men at the bottom of the chain. Kenya has perfected the theatre of arresting foot soldiers while the architects of violence remain comfortably beyond reach. That must stop.

The Director of Public Prosecutions must prosecute credible cases without fear, favour or political calculation. Arrest without prosecution is public relations. Investigation without accountability is bureaucracy. Justice requires that evidence lead to consequences.

IPOA must investigate the conduct of police officers wherever there are allegations of omission, complicity, excessive force or failure to protect citizens. Police accountability cannot be suspended because an election season is approaching.

The IEBC must treat political violence as an existential electoral issue. It must work with other constitutional bodies to identify candidates, political actors and networks that employ violence or intimidation and ensure that electoral law is enforced without selective blindness.

The Cabinet Secretary for Interior must stop issuing ritual condemnations and demand measurable institutional action. Condemnation after blood has been spilled is not governance. Prevention is governance. Accountability is governance.

And the President must speak with unmistakable clarity: political violence will not be financed, facilitated, tolerated or protected by the State.

Anything less will be interpreted as permission.

The country does not need another committee. It does not need another solemn statement. It does not need another promise that "investigations are ongoing" while evidence disappears, witnesses become frightened and political temperatures rise. It needs consequences.

The message must be brutally simple: whoever hires a gang, supplies weapons, finances violence, gives instructions, facilitates attacks, obstructs investigations or shields perpetrators will face the full force of the law.

That principle must apply regardless of party, ethnicity, region, office or political proximity.

The most dangerous development in Kenya today is not merely that violence is occurring. It is that violence risks becoming politically useful. Once politicians discover that violence can secure territory, silence opponents, suppress voters and intimidate civil society at little or no cost, violence becomes an instrument of governance.

That is how democracies decay.

Not always through tanks in the streets.

Sometimes through hired youths.

Sometimes through masked men in unmarked vehicles.

Sometimes through attacks on journalists.

Sometimes through the disruption of a peaceful civic meeting.

Sometimes through a police officer looking the other way.

And sometimes through a government that says all the right words while doing too little to stop what everyone can see.

Homa Bay is therefore a warning, not merely a tragedy. Ol Kalou was a warning. The attacks on civil society were warnings. The attacks on journalists are warnings. Each incident tells us that the machinery of political intimidation is becoming emboldened.

Kenya must not wait for the next corpse before discovering its conscience.

The country is heading towards the 2027 General Election. The window for decisive action is narrowing. If the State cannot guarantee peaceful political participation now, why should Kenyans believe it will suddenly acquire the courage and capacity to do so when the stakes are infinitely higher?

The government must dismantle political goonism before political goonism dismantles the Republic.

The offices responsible know who they are. They know their constitutional mandates. They know the laws. They know the names of the institutions that have raised the alarm. They have no excuse for ignorance.

What remains is will.

And if there is no political will to protect Kenyans from violence, then the country has every right to ask the most devastating question of all:

Who, exactly, is governing Kenya?

Because a State that cannot, or will not, protect its citizens from political violence is not exercising authority.

It is surrendering authority.

And Kenya cannot afford to be governed by goons.

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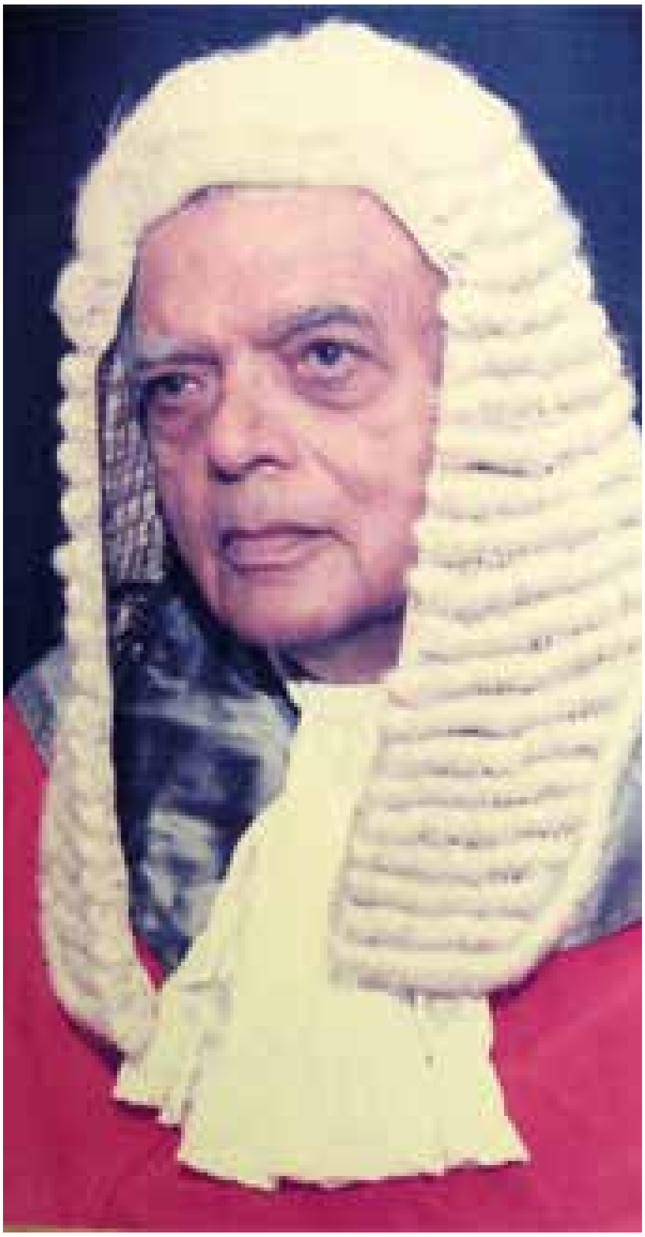
Any further information can be obtained from The ***C.B Madan Prize*** Award Committee at **editor@theplatformke.co.ke.** All applications must be received at the above email by **October 20, 2026.**



From Strathmore Law School to Harvard Law School and back: Nyaga Dominic on judgment, institutions and building where it matters

By Evans Ijakaa

"Mountains are completely unimpressed by your CV."

It is an unexpected observation from someone with such a rich CV. Someone whose journey has taken him from Strathmore Law School to Harvard Law School, through Cambridge and New York and back to Nairobi. For Nyaga Dominic, however, the observation captures a philosophy that has shaped his trajectory. Credentials matter only to the extent that they prepare one to undertake work that matters.

Nearly a decade after joining Strathmore University as a law student, Dominic returns to the Sir Thomas More Building (STMB), this time appointed to the adjunct faculty to teach Constitutional Law. It is a homecoming that brings him back to the very place where his interest in the role of law in public life, constitutionalism and in the building of institutions was first explored.

"It is slightly surreal," he reflects.

"There are still classrooms I walk into where I remember exactly where I used

Nyaga Dominic

to sit. Sometimes I am standing at the front discussing constitutional history and suddenly remember being 21, sitting on the other side, trying to think out what kind of lawyer I wanted to become."

The setting is familiar as he puts it, but the perspective is not. He returns not only to the adjunct faculty at Strathmore Law School, but as Lead Counsel at Nyaga Dominic & Co. Advocates, where he advises businesses, investors and public and private institutions on constitutional, commercial, regulatory and cross-border matters. To him, those two roles are inseparable.

"Teaching forces clarity," he says. "Practice ensures that the questions you bring into the lecture theatres are alive."

A foundation in law and public life

Dominic's interest in constitutional law took hold during his undergraduate years at Strathmore.

One of his earliest research papers examined the tension between national security and the principle of non-refoulement at a time when Kenya was in a difficult national debate about refugees and the future of Kakuma refugee camp.

"I remember taking the paper seriously enough to go around looking for people who would challenge it, " he recalls.

That search led him to the constitutional lawyer and former legislator Hon. Gitobu Imanyara. What began as an academic conversation evolved into a professional relationship. Dominic would later spend more than five years working with Imanyara at his firm and as an editor at The Platform for Law, Justice and Society, immersing himself in a tradition of Kenyan lawyers who regarded constitutionalism and the rule of law not as academic subjects but as questions of public life.

During his time at Strathmore, Dominic also received the Chief Justice C.B. Madan Student Laureate Prize in recognition of his contribution to constitutionalism and the rule of law.

"The recognition reinforced something I had already begun to believe," he says. "Law should never stop in textbooks. Its real value lies in how it shapes institutions, protects human dignity and improves the lives of the people living under a constitution."

He describes the Founding Dean, Professor Luis Franceschi, immediate former Assistant Secretary General of the Commonwealth of Nations, as both a teacher and an institution-builder who demonstrated that intellectual excellence, public service and responsibility need not live in separate worlds.

"Professor Franceschi encouraged many of us to see law not simply as a profession but as a vocation with consequences beyond ourselves," he says. "His example showed that teaching, institution-building and public service are not separate paths. They can be part of the same life."

After graduating, Dominic remained at Strathmore as an adjunct Graduate Teaching Assistant before qualifying as an Advocate of the High Court of Kenya. He would later read for a Master of Laws at Harvard Law School, carrying with him many of the questions that had first surfaced in those early years at Strathmore.

Expanding the frame

If Strathmore gave Dominic a strong foundation in law, Harvard expanded the range of questions he believed lawyers should be prepared to confront.

At the Berkman Klein Center for Internet & Society, he worked alongside mathematicians, lawyers, technologists, scientists and public policy experts examining the institutional consequences of emerging technologies. He cross-registered at the Harvard Kennedy School to better understand government and did clinical work on negotiation and dispute system design through the Harvard Negotiation and Mediation Clinical Program (HNMCP).

"The best lawyers I have encountered rarely think in only one discipline," he says. The experience deepened his conviction that many of today's most important opportunities cannot be understood through legal doctrine alone.

"Difficult problems rarely arrive neatly labelled as legal problems," he explains. "They come wrapped in technology, markets, politics, incentives and human behaviour."

The idea echoes Charlie Munger's well-known warning about "the man with a hammer syndrome": the tendency to see every problem through the lens of the one discipline a person knows best. "To the man with only a hammer," Munger observed," every problem looks pretty much like a nail." Lawyers, Dominic believes, are particularly susceptible to that temptation.

"Legal training is indispensable," he says, "but sound judgment often requires us to understand the wider system in which the law operates. Sometimes the legal question is only one part of a much larger institutional, political or commercial problem."

That interdisciplinary instinct now runs through his work across commercial practice, constitutional law, artificial intelligence, digital governance and institutional development. Increasingly, though, his attention has shifted from new technologies to the institutions expected to govern it.

For me, the important question is not simply how African countries adopt emerging technologies," he says. "It is whether African institutions will help shape the rules, standards and systems through which emerging technologies are governed."

He pauses before adding the question that animates much of his recent work. "How do we help shape the standards, ideas and institutions governing these technologies, instead of reacting to decisions made elsewhere?"

Behind it lies a broader conviction: that legal expertise is rarely the end of the inquiry. More often, it is the beginning.

Choosing where to build

"I remember asking myself whether I wanted to be the tail of a lion or the head of a mouse."

It was one of the hardest decisions of his career.
"The further away I was from Kenya, the more clearly I began to see it," Dominic reflects. "At some point, I stopped asking where the next opportunity was and began asking where I could add the most value."

Distance brought an unexpected clarity. Many of the questions that occupied him abroad are the ones he is now helping clients and institutions resolve: how institutions earn trust, how technology reshapes governance, how businesses navigate regulatory change and how African markets, and hope to spend his life answering them. And he has become convinced that much of the answering would happen here: in Kenya, across East Africa and on a wider continent.

"Our role at the firm is to help clients navigate complexity with clarity, structure sound decisions and act with confidence," he explains.

It is a view rooted in a changing understanding of legal practice. As information becomes more accessible, clients are less constrained by access to legal knowledge than by the ability to exercise sound judgment.

"Technology can retrieve information almost instantly," Dominic says. "What clients continue to value is judgment." They rarely come to a lawyer seeking an abstract recital of legal principles. "They want to understand the choices before them, the risks attached to those choices and the course most likely to solve the underlying problem. Our task is to bring clarity, structure and judgment to those decisions."

Teaching beyond the textbook

The same philosophy shapes Dominic's teaching. He treats constitutional law as a study of power, institutions, incentives and human experience.

"Constitutional law is not simply about memorising provisions or judicial decisions," he says. "It is about understanding how power is created, distributed, restrained and exercised."

In his first Constitutional Law class, he posed what seemed like a simple question: what if the Constitution had been suspended that morning?

The discussion quickly moved beyond doctrine. Students began asking what such a decision would mean for the courts, Parliament, executive authority, individual rights and the ordinary assumptions on which public life depends.

"I wanted them to see that the Constitution is not an abstract text sitting above society," he explains. "It structures government, protects rights and defines the terms on which public power may be exercised."

His aim, he says, is to form lawyers who understand the consequences of institutional decisions and advise responsibly when the answers are not obvious.

"A technically correct lawyer can still give profoundly unwise advice," he says. "Legal education must therefore form judgment and a sense of responsibility, not simply transmit information."

Teaching, in this view, is as much formation as instruction. Students must master doctrine, but they must also learn how to exercise judgment when legal rules point in different directions or leave competing interests unresolved.

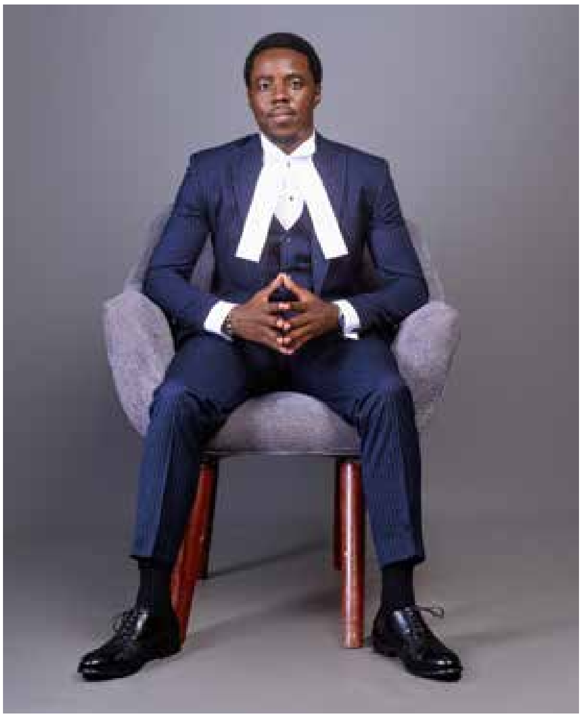
"The most difficult questions are rarely difficult because no legal rule exists," he says. "They are difficult because several legitimate interests are in tension, and someone must decide how they should be reconciled."

Writing for the public

In his writing for *Business Daily*, he examines the intersection of law, technology, markets and institutional development, from Africa's growing dependence on foreign artificial intelligence systems and digital infrastructure to the concentration of power in technology markets and the institutional choices that accompany technological change.

For him, public writing is not separate from legal practice. It is an extension of it.

"Some legal questions affect far more people than those seated around a client conference table," he says. "Writing lets lawyers contribute to the wider public



conversation about the institutions, technologies and markets we are building."

The same interdisciplinary instinct that shapes his advisory work informs his writing. Law matters, he believes, but so do economics, technology, incentives and psychology because law does not operate in vacuum.

So, he hopes his writing does more than explain legal developments. It should help businesses, policymakers and citizens think more clearly about the choices that shape markets and public institutions long before those choices harden into disputes.

"A lawyer should sometimes be able to contribute before there is a client in the room," he says. "Public writing, at its best, improves the quality of the conversation."

Mentorship, responsibility and coming full circle

"The legal profession has a remarkable way of bringing people full circle," he reflects. "The people who once welcomed you to the profession may eventually become your peers." Dominic speaks about the transition with gratitude and a growing sense of responsibility.

He sees his return to Strathmore as an opportunity to help form lawyers who will one day advise businesses, shape institutions and exercise public responsibility in their own right. "Receiving a good education creates a responsibility," he says. "At some point, you have to ask what you will build with what others invested in you."

The view from the mountain top

Away from clients, lectures and public writing, Dominic finds perspective in the mountains. He has climbed both Mount Kenya and Mount Kilimanjaro.

"When you are climbing Kilimanjaro at three in the morning, nobody cares where you studied or what appointment you hold," he says with a smile. "You simply focus on the next step."

Perhaps that is the real lesson of the mountain. A legal career, in much the same way, is measured not by the institutions one enters or the distinctions one accumulates, but by the people one serves, the institutions to which one adds value and the judgment one leaves behind.

That, for Nyaga Dominic, is where building matters.

Evans Ijakaa is a journalist, communications practitioner and development advocate with experience bridging policy frameworks, media and public awareness. He serves as the Communications Officer at Strathmore Law School and the Policy Awareness Officer at the school's Forced Migration and Displacement Research Hub.

COVER STORY

The ghost of Justice Philip Waki: Has Kenya outgrown, or merely institutionalized, state-sponsored goonism?

By Donald Nyongesa

Justice Philip Waki

Abstract

On 15 October 2008, Justice Philip Waki delivered to President Mwai Kibaki and the Panel of Eminent African Personalities a 529-page indictment of Kenya's political culture: the Report of the Commission of Inquiry into Post-Election Violence (CIPEV), which determined that the deaths of at least 1,133 Kenyans following the 2007 election were attributable not to spontaneous ethnic conflict but to organised, financed and politically orchestrated violence, executed substantially by gangs recruited and remunerated by political and commercial elites. Seventeen years later, on 12 July 2026, armed men uniformly characterised in police statements and press reportage as "goons" assailed a church service and a political rally in Kisumu and Nyahururu respectively, days ahead of a parliamentary by-election in Ol Kalou, while the state security apparatus constitutionally obliged to safeguard both assemblies either failed to discharge that duty or, on credible allegation, acquiesced in its breach. This article interrogates the question its title poses directly: has Kenya outgrown the mechanism Waki diagnosed, or has it merely institutionalised it? Testing that question against the successive collapse of the domestic Special Tribunal and the International Criminal Court process, the documented recurrence of hired political violence across three subsequent electoral cycles, Kenya's constitutional guarantees under Articles 21, 37 and 244, and the 84.1 per cent probability of electoral violence a 2026 statistical index now assigns to 2027, the article concludes that Kenya has not outgrown its ghost. It has, rather, furnished the ghost a permanent address, and continues to service the tenancy.

I. Introduction

Ghosts, the old people say, do not haunt out of malice. They haunt because something was left unburied, some name unspoken, some debt unsettled, and they return to the same threshold,

Nairobi Senator Edwin Sifuna

on the same species of morning, until the living finally reckon with what they left undone. Kenya harbours such a ghost. On the morning of 12 July 2026, he returned once more, attired this time in a machete and a rungu, wearing the countenance of a young man remunerated, perhaps, to the tune of a thousand shillings to ensure that a church service in Kisumu concluded in teargas and conflagration rather than benediction.

Worshippers assembled that Sunday at St Stephen's ACK Cathedral had no reason to anticipate needing an exit strategy.[1] By the time the service concluded, police were deploying teargas to clear a passage for Siaya Governor James Orengo and Nairobi Senator Edwin Sifuna through a crowd of young men armed with machetes, rungus, bows and arrows, several of whom had already set nine motorcycles alight.[2] One person was dead. Several more sustained injuries. Fourteen suspects would be apprehended within forty-eight hours, the majority of them not the architects of the assault but merely those who could not evade capture.[3] That same afternoon, in Nyahururu, a rally addressed by the opposition-aligned Linda Mwananchi movement was pelted with stones; Murang'a Governor Irungu Kang'ata alleged that his driver had been shot in the chest by a security officer, a claim the National Police Service categorically denied, attributing the injury instead to flying stones.[4]

It was, by the prevailing standards of 2026, an unremarkable Sunday. A week earlier, a Linda Mwananchi convoy had been ambushed in Keumbu, Kisii County, leaving one dead and upward of twenty injured.[5] A month earlier, motorcycle-riding gangs had stormed a Nairobi cathedral to disrupt a civil society meeting convened on the 2026 Finance Bill.[6] Days after Kisumu and Nyahururu, Kenyans would proceed to the polls for a parliamentary by-election in Ol Kalou.[7]

A survey of the coverage of these events, in wire copy, in the terse communiqués of the

[1]'Injuries Reported as Goons Disrupt Linda Mwananchi's Kisumu Church Service' (Kenyans.co.ke, 13 July 2026) <https://www.kenyans.co.ke/news/125180-armed-goons-threaten-disrupt-church-service-attended-sifuna-kisumu> accessed 16 July 2026.
[2]'One Killed, 14 Arrested During Violence in Kisumu and Nyahururu' (KDRTV, 13 July 2026) <https://www.kdrtv.co.ke/news/one-killed-14-arrested-during-violence-in-kisumu-and-nyahururu/> accessed 16 July 2026; '14 arrested over chaos at opposition events in Kisumu, Nyahururu' Daily Nation (Nairobi, 13 July 2026) <https://nation.africa/kenya/counties/14-arrested-over-chaos-at-opposition-events-in-kisumu-nyahururu-5525266> accessed 16 July 2026.
[3]'14 suspects charged over Kisumu, Nyahururu violence' (Kahawatungu, 13 July 2026) <https://kahawatungu.com/14-suspects-charged-over-kisumu-nyahururu-violence/> accessed 16 July 2026.
[4]'Irungu Kang'ata's Driver Shot During Linda Mwananchi Rally' (The Kenya Times, 13 July 2026) <https://thekenyatimes.com/breaking-news/irungu-kangatas-bodyguard-shot/> accessed 16 July 2026; '1 Killed, 14 Suspects Arrested After Sunday Clashes in Kisumu and Nyahururu' (Nairobi Leo, 13 July 2026) <https://nairobileo.co.ke/news/article/28775/1-killed-14-suspects-arrested-after-sunday-clashes-in-kisumu-and-nyahururu> accessed 16 July 2026.
[5]Daily Nation (n 2).
[6]'Kick out police commissioner over rising insecurity' The Standard (Nairobi, 14 July 2026) <https://www.standardmedia.co.ke/opinion/article/2001552727/kick-out-police-commissioner-over-rising-insecurity> accessed 16 July 2026.
[7]Kahawatungu (n 3).

National Police Service, in the indignant social media exchanges of politicians on both sides of the aisle, reveals one word recurring with such frequency that it has been all but sanded smooth of its horror: "goons." Young men, armed, organised, transported and paid, deployed to disrupt a rally, storm a church, or intimidate a crowd, before dissolving, once the cameras withdraw, back into whatever economy of casual violence produced them, awaiting the next summons. A term this pedestrian, worn this effortlessly into daily speech, is not the symptom of an emergent disorder. It is the vocabulary of an entrenched one, spoken fluently by people who no longer recall, or decline to recall, when they first acquired it.

Eighteen years earlier, in the autumn of 2008, a judge of Kenya's Court of Appeal furnished an answer to that question across 529 pages that Kenya's political class has spent every subsequent year attempting to forget. Justice Philip Waki's Commission of Inquiry into Post-Election Violence (CIPEV) did not conclude that Kenyans had simply turned upon one another. It concluded that a substantial proportion of the violence that followed the 2007 election, in which at least 1,133 people were killed and 663,921 displaced, was organised, financed and directed by political and business elites, employing gangs recruited for that express purpose.[8] The Commission recommended a domestic tribunal to prosecute those elites, sealed a list of their names in an envelope, and cautioned that inaction would not resolve the matter but merely postpone it.[9]

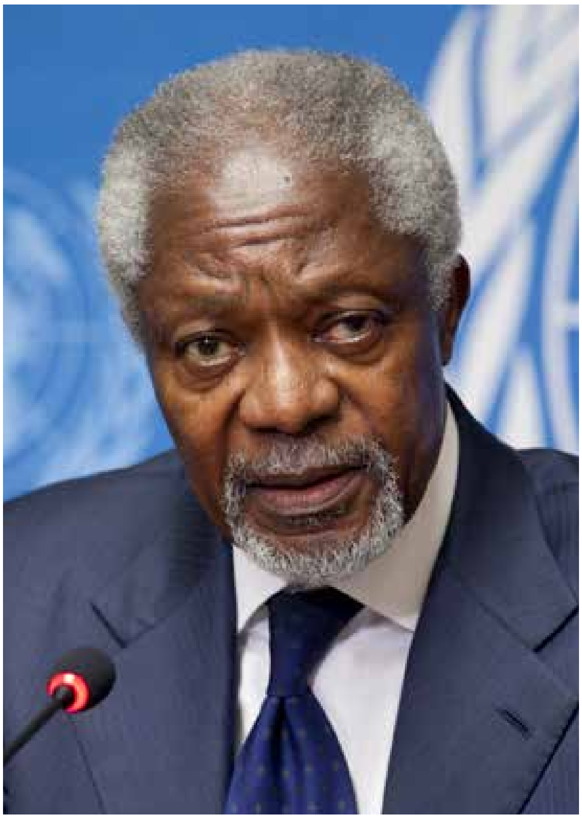
This article derives its title from a question that is not rhetorical, however it may sound: has Kenya outgrown the mechanism the Waki Commission diagnosed in 2008, or has it, across the intervening seventeen years, simply institutionalised it, furnishing it with a rate card, a recruitment pipeline, and a fixed slot on the political calendar? The evidence adduced below, spanning the collapse of accountability at home and in The Hague, the documented recurrence of hired political violence across three subsequent electoral cycles, and the specific constitutional guarantees that were designed to forestall precisely what transpired in Kisumu and Nyahururu, points, with some regret, toward the latter conclusion. Kenya's ghost is not restless because it cannot find repose. It is restless because it has found a home, and the household has learned to lay a place for him at the table.

A brief note on method is warranted before that evidence is marshalled. This article does not rely on testimony obtained first-hand, nor does it purport to adjudicate the specific, and in one instance sharply contested, factual disputes surrounding the events of 12 July 2026; that function belongs to the courts and to whatever commission of inquiry, if any, follows this one. Its method is documentary and comparative: it reconstructs the CIPEV Report's own findings from the primary text and the secondary scholarship that has since engaged with it, traces the subsequent judicial and prosecutorial record through case law and contemporaneous reporting corroborated across multiple independent outlets, and tests the resulting pattern against a statistically modelled forecast published independently of this article's own conclusions. Where the underlying facts are genuinely disputed, as with the question of who instigated the confrontation at Kisumu, this article says so explicitly rather than adopting

[7]Kahawatungu (n 3).

[8]Fédération Internationale pour les Droits Humains (FIDH), 'Termination of Ruto and Sang case at the ICC: Witness tampering means impunity prevails over justice again' (2016) <https://www.fidh.org/en/region/Africa/kenya/termination-of-ruto-and-sang-case-at-the-icc-witness-tampering-means> accessed 16 July 2026 (citing the casualty and displacement figures relied upon in the ICC proceedings, drawn from the CIPEV Report).

[9]Republic of Kenya, Report of the Commission of Inquiry into Post-Election Violence (CIPEV) (Government Printer 2008); Human Rights Watch, '100% Waki' (28 November 2008) <https://www.hrw.org/news/2008/11/28/100-waki> accessed 16 July 2026.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the account most convenient to its thesis. The argument that follows does not depend on resolving that particular dispute, and the reader is entitled to know why.

II. The report Kenya was not ready to hear

The Commission of Inquiry into Post-Election Violence was not Kenya's idea, or at least not entirely. It originated in Agenda Item 4 of the National Accord and Reconciliation Agreement brokered in February 2008 by former UN Secretary-General Kofi Annan's mediation team, which called for a suite of bodies to address the immediate crisis alongside Kenya's longer-standing afflictions of governance and impunity.[10] A three-member Commission was constituted by Gazette Notice: its chair, Justice Philip Waki of the Court of Appeal, and two international commissioners, Gavin McFadyen of New Zealand and Pascal Kambale of the Democratic Republic of Congo, assisted by counsel David Majanja and Commission Secretary George Kegoro.[11] Its mandate was tripartite: to investigate the facts of the violence that followed the 2007 election, to scrutinise the conduct of state security agencies during it, and to recommend legal, political or administrative measures, including measures to bring to justice those responsible for criminal acts.[12] Labouring against a three-month clock repeatedly and grudgingly extended, the Commission delivered its report to President Mwai Kibaki and the Panel of Eminent African Personalities on 15 October 2008.[13]

What CIPEV documented, across five parts and 529 pages, was violence without precedent in Kenya's post-independence history, not in the sense that Kenya had never witnessed election-related bloodshed, but in scale, geographic dispersion and, critically, timing.[14] Where earlier cycles of politically instrumentalised ethnic violence, most notoriously the clashes of the early 1990s, had tended to precede elections, calculated to displace voters before they could cast a ballot, the 2007–2008 violence erupted after the vote, once Mwai Kibaki had been controversially declared victor over Raila Odinga.[15] It touched all but two of Kenya's provinces, urban slum and rural farmstead alike, and left, on the figures subsequently relied upon in ICC filings, at least 1,133 people dead, 663,921 displaced, and no fewer than 900 documented cases of sexual and gender-based

[10]International Center for Transitional Justice (ICTJ), The Kenyan Commission of Inquiry into Post-Election Violence (2008) <https://www.ictj.org/sites/default/files/ICTJ-Kenya-Dialogue-Inquiry-2008-English.pdf> accessed 16 July 2026.
[11]ibid; 'Waki Commission' (Wikipedia) <https://en.wikipedia.org/wiki/Waki_Commission> accessed 16 July 2026.
[12]ICTJ (n 10).
[13]'Waki Commission' (n 11).
[14]ReliefWeb, 'Kenya: Commission of Inquiry into the Post Election Violence (CIPEV) final report' (2008) <https://reliefweb.int/report/kenya/kenya-commission-inquiry-post-election-violence-cipev-final-report> accessed 16 July 2026.
[15]ibid.

violence, a considerable proportion of which the Commission found had been perpetrated by police officers themselves. Dead, displaced, violated, and, in the aggregate, unanswered for: the ledger CIPEV compiled reads less like the record of a single election than the balance sheet of an entire political order.[16]

Crucially, CIPEV declined the more comfortable explanation, that this was ethnic animus erupting spontaneously among neighbours. Its own diagnosis pointed elsewhere:

> *"The fact that armed militias, most of whom developed as a result of the 1990s ethnic clashes, were never de-mobilized led to the ease with which political and business leaders reactivated them for the 2007 post-election violence... the increasing personalization of power around the presidency continues to be a factor in facilitating election related violence."*[17]

In Naivasha and Nakuru, the Commission found, the Mungiki gang, acting on behalf of the ruling Party of National Unity, executed retaliatory attacks upon individuals presumed to have voted for the opposition; elsewhere in Nairobi and the Rift Valley, other organised youth formations did likewise on the opposing side.[18] This was, on the Commission's own findings, a conflict waged substantially by hired hands, recruited, remunerated and subsequently discarded by the political and commercial figures who financed them, a distinction the Commission took evident care to draw and one that Kenya's subsequent public memory has taken considerably less care to preserve.

III. The envelope and the unravelling of accountability

Waki's central recommendation was not merely investigative. It was structural: a Special Tribunal for Kenya. It was to be rooted directly in the constitution, so that it could not be dissolved by an ordinary act of the very Parliament whose members might appear on its docket. And it was to be staffed with a deliberate international component of judges, prosecutors and investigators, calculated to insulate it from the political interference the Commission had just spent four months documenting.[19] Rather than publish the identities of those it held most culpable, the Commission sealed them in an envelope and delivered it, together with supporting evidence, to the Panel of Eminent African Personalities chaired by Kofi Annan, on a specific condition: should Kenya fail to establish the tribunal within a defined interval, the envelope would proceed instead to the International Criminal Court.[20] On 16 December 2008, President Kibaki and Prime Minister Odinga signed an agreement committing to precisely that outcome, undertaking to produce a Cabinet-drafted bill and statute within sixty days.[21]

It did not come to pass. Parliament and Cabinet rejected successive proposals to establish the tribunal throughout 2009; certain legislators contended openly that they preferred the accused stand trial at The Hague rather than at home, a preference history would eventually expose as a considerable miscalculation.[22]
In July 2009, Kofi Annan delivered the sealed envelope to ICC Chief Prosecutor Luis Moreno-

[16] FIDH (n 8).
[17] Republic of Kenya, CIPEV Report (n 9), as excerpted in Kenya National Commission on Human Rights, Waki_Report.pdf <https://www.knchr.org/Portals/0/Reports/Waki_Report.pdf> accessed 16 July 2026.
[18] Human Rights Watch, '"We Were Sent to Kill You": Gang Attacks in Western Kenya and the Government's Failed Response' (24 April 2014) <https://www.hrw.org/report/2014/04/24/we-were-sent-kill-you/gang-attacks-western-kenya-and-governments-failed-response> accessed 16 July 2026.
[19] Human Rights Watch, '100% Waki' (n 9).
[20] Human Rights Watch, '"Turning Pebbles": Evading Accountability for Post-Election Violence in Kenya' (9 December 2011) <https://www.hrw.org/report/2011/12/09/turning-pebbles/evading-accountability-post-election-violence-kenya> accessed 16 July 2026.
[21] ibid.
[22] ibid.

Ocampo.[23] Investigations opened in March 2010; a year later, the Prosecutor summonsed six prominent Kenyans, the "Ocampo Six", William Ruto, Henry Kosgey and broadcaster Joshua Sang on one side of the 2007 contest, and Uhuru Kenyatta, Francis Muthaura and former police chief Mohammed Hussein Ali on the other, on charges of orchestrating crimes against humanity.[24] Judges confirmed charges against four of the six in January 2012, declining to confirm the cases against Kosgey and Ali.[25]

What transpired over the ensuing four years constitutes, in retrospect, a second and equally instructive failure of the Waki architecture, this time unfolding not in Nairobi's Parliament but in The Hague's courtrooms. In March 2013, the Prosecutor withdrew all charges against Muthaura, citing recanting witnesses and Kenya's limited cooperation.[26] In December 2014, an identical fate befell the case against Kenyatta, by then Kenya's sitting President, elected in 2013 on a joint ticket with his co-accused Ruto that openly characterised the ICC process as foreign interference.[27] Finally, on 5 April 2016, ICC judges terminated the last remaining case, against Ruto and Sang, after 157 trial days and no verdict.[28] Sixteen of the prosecution's original forty-two witnesses in that case alone had withdrawn, the majority citing threats, intimidation or fear of reprisal; one man identified by the defence as a potential witness was murdered in late 2014 or early 2015, an investigation whose findings have never been disclosed.[29] The ICC itself subsequently issued arrest warrants against three Kenyans for offences against the administration of justice arising from this pattern of interference.[30] Not one of the six individuals the Waki Commission's own investigative machinery had identified as bearing the gravest responsibility for the 2007–2008 violence has ever been convicted, whether domestically or internationally, of it.[31]

The lesson of this decade-long sequence is not merely that Kenya's elites evaded justice. It is that they evaded it twice, by two ostensibly distinct mechanisms, domestic legislative refusal and international witness interference, which were, in substance, the identical mechanism wearing different vestments: the capacity of politically connected actors to render the machinery of accountability too perilous for ordinary people to operate.

IV. A mechanism left intact

If the accountability structures collapsed, the underlying mechanism they were designed to dismantle did not. Five years after Waki reported, Human Rights Watch documented a fresh wave of gang attacks in Bungoma and Busia counties in Western Kenya ahead of the 2013 election, and traced them directly to the same recruitment networks CIPEV had identified in 2007–2008; localities with no antecedent history of gang activity prior to that election have sustained one ever since.[32] By 2017, the Global Initiative Against Transnational Organised Crime found that the Mungiki's successors had multiplied rather than disbanded, from approximately thirty-three identified criminal gangs in 2010 to 326 by 2017, nine in every ten implicated, directly

[23]'Waki Commission' (n 11).
[24]Coalition for the International Criminal Court, 'Kenya' <https://www.coalitionfortheicc.org/country/kenya> accessed 16 July 2026.
[25]ibid.
[26]Coalition for the International Criminal Court, 'Uhuru Kenyatta' <https://www.coalitionfortheicc.org/cases/uhuru-kenyatta> accessed 16 July 2026.
[27]ibid.
[28]Human Rights Watch, 'ICC: Kenya Deputy President's Case Ends' (5 April 2016) <https://www.hrw.org/news/2016/04/05/icc-kenya-deputy-presidents-case-ends> accessed 16 July 2026.
[29]ibid.
[30]FIDH (n 8).
[31]Human Rights Watch (n 28).
[32]Human Rights Watch (n 18).

or indirectly, in politics.[33] Subsequent research by Nairobi-based Odipo Dev documented something more closely resembling a functioning labour market than a criminal underworld: a "goons rate card," with day rates commencing at 500 shillings, approximately four US dollars, for local council-level assignments, and escalating to 1,000 shillings for operations implicating sitting Members of Parliament.[34] Thirty-three gangs became 326. Five hundred shillings became the going rate for silencing a ward, and a thousand for silencing a constituency. These are not the vital signs of a dying practice.

None of this is, in the strictest sense, novel. The practice of mobilising remunerated youth for political ends in Kenya antedates even the violence Waki investigated, tracing its lineage to the Youth for KANU '92 movement organised under President Daniel arap Moi's patronage during the 1992 campaign, a movement that current President William Ruto himself helped organise as a young politician, years before he stood as one of the six individuals the ICC would later charge over the events of 2007–2008. What Waki's report altered was not the existence of this practice, but the extent to which it was, momentarily, named, documented and inscribed upon the public record as a specific, prosecutable form of organised political violence, rather than dismissed as inexplicable ethnic animosity. That nomenclature did not survive contact with Kenya's institutions of accountability. The practice did, and has since acquired the one attribute a merely tolerated practice never does: a settled price.

V. 2026: The ghost made flesh

The clearest evidence that Waki's diagnosis remains current is not analytical but chronological. In June 2024, Kenya's Finance Bill precipitated a youth-led uprising, remembered simply as "Gen Z," in which dozens of protesters were killed.[36] A year later, on 25 June 2025, organised men armed with whips and clubs, operating, witnesses attested, alongside rather than against the police, assailed a peaceful march commemorating the uprising's anniversary.[37] A week prior, on 18 June 2025, the same actors had confronted a crowd demanding the prosecution of a police officer suspected in the death in custody of teacher and blogger Alfred Ojwang; legislator William Kamket had, days earlier, exhorted youths from his community to travel to Nairobi and "counter" the demonstrators, while Nairobi Governor Johnson Sakaja was compelled to publicly deny allegations that he had disbursed roughly two million shillings to mobilise counter-protesters.[38] Kenya's National Crime Research Centre would subsequently caution, in terms that could have been excerpted from CIPEV itself, that criminal gangs are popular with some politicians who use them for personal gain, especially during electoral processes, and that political leaders must be held accountable for directly and indirectly enabling gangs.[39]

2026 has not interrupted the pattern; it has intensified it, with the Ol Kalou parliamentary by-election, scheduled for 16 July, supplying the immediate occasion. In June, motorcycle-riding gangs stormed All Saints Cathedral in Nairobi to

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[33] Global Initiative Against Transnational Organized Crime, 'Hired gangs unleashed on demonstrators in Nairobi' (1 July 2025) <https://globalinitiative.net/analysis/hired-gangs-unleashed-on-demonstrators-in-nairobi/> accessed 16 July 2026.
[34] 'Kenyan Politicians Accused of Hiring Armed Gangs as Election Tensions Fuel Fears of Escalating Violence' (Sri Lanka Guardian) <https://slguardian.org/kenyan-politicians-accused-of-hiring-armed-gangs-as-election-tensions-fuel-fears-of-escalating-violence/> accessed 16 July 2026.
[35] ibid.
[36] Global Initiative (n 33).
[37] ibid.
[38] ibid.
[39] 'Paid to disrupt: Inside the violent world of Kenya's political goons' Daily Nation (Nairobi, 7 June 2025) <https://nation.africa/kenya/news/politics/paid-to-disrupt-inside-the-violent-world-of-kenya-s-political-goons-5072372> accessed 16 July 2026 (quoting the National Crime Research Centre).

Siaya Governor James Orengo

disrupt a civil society meeting convened on the 2026 Finance Bill.[40] Gatherings of former Deputy President Rigathi Gachagua's Democracy for Citizens Party have been disrupted repeatedly, including, Gachagua alleges, an attempt upon his life at a church in Witima, Nyeri.[41] On 4 July, a convoy belonging to the opposition-aligned Linda Mwananchi movement, touring Nyandarua and Laikipia ahead of the by-election, was attacked in Keumbu, Kisii County; one person was killed and upward of twenty injured.[42] Eight days later, on 12 July, came Kisumu and Nyahururu.

In Kisumu, footage subsequently verified by multiple outlets depicted young men armed with machetes, rungus, bows and arrows advancing upon St Stephen's ACK Cathedral while police, substantially outnumbered, looked on.[43] Governor Orengo, confined within alongside Senator Sifuna, accused named state officials and individuals affiliated with a rival faction of orchestrating the attack, invoking an explicit comparison to Haiti: "If you want to go to Haiti, Haiti is here."[44] Sifuna, addressing the congregation from the pulpit days after his removal as ODM Secretary-General, declared that "goons and violence will not stop or intimidate us."[45] The confrontation left one person dead, several injured, nine motorcycles incinerated and a police vehicle damaged; fourteen suspects, evidently those least capable of evading capture, were arrested and arraigned within a day.[46]

That account has not gone unchallenged. Homa Bay Governor Gladys Wanga, addressing a separate public forum three days later, accused Sifuna and Orengo of importing outside agitators and staging the confrontation themselves, contending that no attack upon the cathedral building had occurred and that it was the two leaders who sallied forth to confront the youths gathered nearby, in her words "to create sympathy for ourselves."[47] This is a grave counter-allegation, advanced by a sitting governor rather than an anonymous critic, and it cannot simply be dismissed in favour of the account Orengo and Sifuna have furnished. Intellectual honesty requires the concession that the specific facts of who instigated the Kisumu confrontation remain genuinely contested, even though the broader pattern this article traces, hired violence recurring across three decades of Kenyan elections, does not depend upon resolving that particular dispute.

In Nyahururu that same afternoon, a Linda Mwananchi rally was pelted with stones.

[40]The Standard (n 6).
[41]ibid.
[42]Daily Nation (n 2).
[43]Kenyans.co.ke (n 1); The Kenya Times (n 4).
[44]'Kenya: State Under Pressure Over Rising Goon Violence As Armed Attacks Fuel Election Fears' (allAfrica.com, 13 July 2026) <https://allafrica.com/stories/202607130124.html> accessed 16 July 2026.
[45]Daily Nation (n 2).
[46]Kahawatungu (n 3); KDRTV (n 2).
[47]'Gladys Wanga Accuses Sifuna, Orengo of Hiring Goons During Kisumu Attack: "To Create Sympathy"' (Tuko.co.ke, 15 July 2026) <https://www.tuko.co.ke/politics/632919-gladys-wanga-accuses-sifuna-orengo-hiring-goons-kisumu-attack-create-sympathy/> accessed 18 July 2026.

Murang'a Governor Irungu Kang'ata maintained that his driver, Gitari, had been shot in the chest by a security officer, and circulated an image of the wound; the National Police Service, while confirming that one member of the public, Joseph Gitau, had sustained a chest injury, insisted no shooting incident had occurred and attributed the injury to thrown stones.[48] Whichever account is accurate, and the two cannot both be, the National Police Service's own public statement is itself instructive: it condemned acts of political intolerance, violence and goonism, and pledged an investigation regardless of political affiliation or public office, language that concedes the phenomenon even as it disputes culpability for this specific incident.[49] Vihiga Senator Godfrey Osotsi articulated the underlying accusation more bluntly than any government spokesperson could concede: "our government has been reduced to a gangster government. The IG should tell us whether he is in charge or whether he has left the leadership of the police to the goons."[50]

Vihiga Senator Godfrey Osotsi

The pattern did not conclude with the events of 12 July. On 24 July, Health Cabinet Secretary Aden Duale, addressing a community gathering in Lafey Constituency, Mandera County, in Somali, praised President Ruto for restoring what he termed the dignity of the Somali community, before alleging that certain unnamed communities had declared that "nobody else will live well in Kenya except them" and that "Kenya is ours and nobody else will live in Kenya."[51] Critics, prominent among them Kirinyaga Governor Anne Waiguru, a senior figure within Duale's own governing coalition, construed the remarks as directed at the Kikuyu community, and did so explicitly in connection with the Ol Kalou by-election; Waiguru characterised the comments as "deeply regrettable" and "dangerous," and demanded a public apology.[52] The rebuke assumed its sharpest register on the floor of the Senate, where Narok Senator Ledama Olekina, joined by colleagues from across the political divide, cautioned that such rhetoric risked returning the country to the conditions that preceded the violence of 2007–2008, the precise historical referent this article has traced throughout.[53] The National Cohesion and Integration Commission, a body whose own institutional lineage runs directly to the settlement that followed that violence, opened a formal investigation into the remarks within a day of their circulation;

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[48]The Kenya Times (n 4); 'Killed, 14 Arrested after Chaos Erupts During Kisumu and Nyahururu Rallies' (Tuko.co.ke, 13 July 2026) <https://www.tuko.co.ke/kenya/counties/632349-1-killed-14-arrested-chaos-erupts-kisumu-nyahururu-rallies/> accessed 16 July 2026.
[49]Tuko.co.ke (n 48).
[50]The Kenya Times (n 4).
[51]'Kenya: Waiguru Demands Duale Apology Over "Deeply Regrettable" Ethnic Profiling Remarks' (allAfrica.com, 24 July 2026) <https://allafrica.com/stories/202607240511.html> accessed 25 July 2026.
[52]ibid.
[53]'Kenya: Senators Condemn Duale's Alleged Tribal Remarks, Demand Senate Motion' (allAfrica.com, 24 July 2026) <https://allafrica.com/stories/202607240103.html> accessed 25 July 2026.

Duale, for his part, denied any intent to incite, characterising the criticism as a deliberate distortion of remarks he maintained were consistent with his professed commitment to "national unity, peaceful coexistence and equal opportunity for every Kenyan."[54] Whatever that investigation ultimately concludes, the episode supplies its own evidence for this article's argument, independent of its outcome. CIPEV's diagnosis was never confined to the machete and the rungu; it extended, with equal emphasis, to the rhetoric of exclusion that renders their deployment thinkable in the first instance. That a serving Cabinet Secretary can be heard, in July 2026, deploying language three sitting senators independently likened to the antecedents of 2007–2008, is not evidence that the ghost has been exorcised. It is evidence of precisely how comfortably he has settled into residence.

VI. Measuring the ghost: What the 2026

Electoral Vulnerability Index confirms

Three days after Kisumu and Nyahururu, on 13 July 2026, the Kofi Annan Foundation, the institutional heir to the very Panel of Eminent African Personalities that once held Waki's sealed envelope, published its Electoral Vulnerability Index for 2026–2027, estimating an 84.1 per cent probability that Kenya will experience some form of electoral violence during the August 2027 General Election, against a Sub-Saharan African average of 51.1 per cent.[55] The figure situates Kenya second only to Nigeria among the ten democracies the European Union has flagged as priority concerns for the current global electoral cycle.[56] What is most instructive is not the headline figure but the report's own explanation for it. Kenya's underlying institutional risk score, 45.4, in fact sits below the regional baseline; the Foundation credits the comparatively contained 2022 election and the Supreme Court's disposition of that year's presidential petition as evidence that Kenyan institutions can, under duress, hold.[57] The Index nonetheless drives the aggregate probability upward on account of what it terms conflict dynamics: ethnic and local patronage competition, economic grievance and youth mobilisation, and police conduct, three drivers that correspond with uncomfortable precision to CIPEV's own 2008 diagnosis.[58] The Foundation appends a detail of its own resonance: Kenya, it observes, has never completed two consecutive electoral cycles absent some form of violence.[59]

The report further flags a variable Waki could not have anticipated: the death of former Prime Minister Raila Odinga in October 2025, which the Foundation suggests may either attenuate opposition mobilisation or, conversely, precipitate a succession contest generating unpredictable new alliances the government has not previously been compelled to negotiate with.[60] It is a measure of how little the underlying mechanism has altered that a statistically modelled forecast published in 2026

[54]'NCIC launches probe into alleged ethnic incitement by Duale' (Kahawatungu, 24 July 2026) <https://kahawatungu.com/ncic-launches-probe-into-alleged-ethnic-incitement-by-duale/> accessed 25 July 2026; 'NCIC probes Duale over alleged ethnic remarks as CS denies incitement' The Star (Nairobi, 24 July 2026) <https://www.the-star.co.ke/news/2026-07-24-ncic-probes-duale-as-cs-denies-ethnic-incitement-claims> accessed 25 July 2026.

[55]'Kenya faces 84% chance of experiencing PEV in 2027 – Kofi Annan report' (People Daily, 14 July 2026) <https://peopledaily.digital/news/kenya-faces-84-chance-of-experiencing-pev-in-2027-kofi-annan-report> accessed 16 July 2026; Kofi Annan Foundation, 'Beyond the Index: New country analyses examine electoral risks in 2026–2027' (11 June 2026) <https://www.kofiannanfoundation.org/news/beyond-the-index-new-country-analyses-examine-electoral-risks-in-2026-2027/> accessed 16 July 2026.

[56]'Kenya ranked world's second-riskiest democracy for election violence' The Star (Nairobi, 15 July 2026) <https://www.the-star.co.ke/news/2026-07-15-report-flags-kenya-as-2nd-global-election-violence-hotspot> accessed 16 July 2026.

[57]'Kofi Annan Foundation Flags Kenya Among Countries at Risk of Election Violence Ahead of 2027 Poll' (Kenyans.co.ke, 12 July 2026) <https://www.kenyans.co.ke/news/125175-kofi-annan-foundation-flags-kenya-among-countries-risk-election-violence-ahead-2027> accessed 16 July 2026.

[58]ibid; People Daily (n 55).

[59]'Kofi Annan Foundation warns of high risk of violence in 2027 elections' (Citizen Digital, 16 July 2026) <https://citizen.digital/article/kofi-annan-foundation-warns-of-high-risk-of-violence-in-2027-elections-n386412> accessed 16 July 2026.

[60]ibid.

identifies substantially the same risk factors, patronage, grievance, youth mobilisation and policing, that a judge of the Court of Appeal identified through witness testimony in 2008.

VII. Article 21, Article 37, Article 244, and the failure of neutrality

Kenya's Constitution does not consign the question of what ought to have transpired in Kisumu and Nyahururu to inference. Its point of departure is a general one. Article 21(1) provides:

> *"It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights."*[61]

The operative term is "protect," situated alongside the more familiar "respect." A duty merely to respect rights would oblige the State only to refrain from violating them itself. A duty to protect obliges the State to forestall violation by others, private armed actors included. Construed thus, Article 21(1) is not an aspirational preamble. It is the constitutional foundation for treating a police service's failure to intervene against private violence as a rights violation in its own right, rather than merely an unfortunate lapse in service delivery.

Article 37 supplies the specific right to which this general duty attaches in the Kisumu and Nyahururu context, in language a first-year law student could recite from memory:

> *"Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities."*[62]

The right is not, on its face, conditional upon the goodwill of the National Police Service, the popularity of an assembly's organisers, or the political expedience of the moment. It attaches to "every person," and its sole textual qualifications, peaceable conduct and the absence of weapons, describe the conduct of the assembly, not the discretion of the state to permit or obstruct it. Kenyan courts have construed this to impose a duty running in the opposite direction. In April 2025, the High Court, in Law Society of Kenya v Kithinji, held, in terms directly germane to what would transpire in Kisumu fourteen months later, that the police service bears an obligation to assure the public of peace and order, extending to both participants in an assembly and non-participants, and that a positive obligation rests upon the State to facilitate and protect the peaceful exercise of Article 37 rights.[63] Article 21(1)'s general duty to protect and Article 37's specific guarantee thus point in identical directions: a cathedral congregation and a rally audience were owed active protection, not merely an absence of state interference.

That principle is not merely doctrinal in the Kisumu context; it has already been tested against the very violence to which this article traces its origins. In December 2020, the High Court decided ***Coalition on Violence Against Women & 11 Others v Attorney-General & 5 Others***, a constitutional petition brought by survivors of sexual and gender-based violence arising from the 2007–2008 post-election violence itself.[64] Four of the eight survivor-petitioners prevailed, and, tellingly, one had

[61]Constitution of Kenya 2010, art 21(1).
[62]Constitution of Kenya 2010, art 37.
[63]Law Society of Kenya v Kithinji & 5 others; Katiba Institute & another (Interested Parties) (Petition E373 of 2024) [2025] KEHC 7957 (KLR) (Constitutional and Human Rights Division, 30 April 2025), para 79 <https://new.kenyalaw.org/akn/ke/judgment/kehc/2025/7957/eng@2025-04-30> accessed 16 July 2026.
[64]Coalition on Violence Against Women (COVAW) & 11 Others v Attorney-General of the Republic of Kenya & 5 Others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 Others (Amicus Curiae) [2020] eKLR (High Court, Constitutional and Human Rights Division, 10 December 2020); Perpetua Akoth Adar, 'Domestic Accountability through Strategic Litigation: Towards Redress and Reparations for Kenya's 2007-2008 Post-Election Sexual and Gender-Based Violence' (2022) 22 African Human Rights Law Journal 213 <https://scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962022000100010> accessed 18 July 2026.

been attacked not by a police officer but by private individuals; the government was nonetheless held liable because, although the survivor had identified her attackers and disclosed their whereabouts to the police, no investigation or arrest ever ensued. Korir J held that Kenya owed a positive obligation to investigate and prosecute violations of the right to life, the prohibition of torture, and the security of the person, arising from the identical 2007–2008 violence Waki investigated, and delineated the threshold for state responsibility for private violence as whether it occurred with the "instigation, consent or acquiescence" of a public official.[65] Twelve years after CIPEV and six years before Kisumu, a Kenyan court had already held that declining to pursue known attackers is itself a constitutional wrong. Whatever conclusion the National Police Service's promised investigation into Kisumu and Nyahururu reaches on the question of complicity, it will be measured against precisely that standard.

That obligation runs directly into Article 244, which prescribes, in equally unambiguous terms, what the National Police Service is constitutionally required to be:

> *"The National Police Service shall— (a) strive for the highest standards of professionalism and discipline among its members; (b) prevent corruption and promote and practice transparency and accountability; (c) comply with constitutional standards of human rights and fundamental freedoms..."*[66]

It is worth pausing upon how precisely this language answers the Waki Commission's own findings. CIPEV devoted an entire volume of its report to the conduct of the security services during the 2007–2008 violence, finding, among other matters, that police officers had themselves perpetrated a considerable share of the documented sexual and gender-based violence, and that the security apparatus had in places conducted itself as a partisan actor rather than a neutral one.[67] Article 244's insistence upon professionalism, incorruptibility and constitutional compliance was not drafted in a vacuum. It was written, in the constitutional settlement that followed CIPEV, as a direct rejoinder to that very failure. The Independent Policing Oversight Authority Act, which established the civilian oversight body Waki's report anticipated, states as much explicitly, describing its own purpose as being to "give effect to the provision of Article 244 of the Constitution that the Police shall strive for professionalism and discipline and shall promote and practice transparency and accountability."[68]

Measured against that constitutional architecture, the most defensible legal characterisation of 12 July 2026 is an omission: a failure, whether through incapacity or negligence, to discharge the Article 21(1) duty to protect and the Article 244 duty of professionalism, by permitting armed private actors to assail a congregation and a crowd the State was obliged to shield. A graver characterisation, complicity, has also been alleged. Governor Orengo and Senator Osotsi have publicly accused named officials of active involvement rather than mere failure, and the National Police Service's own undertaking to investigate regardless of political affiliation or public office constitutes, at minimum, a tacit acknowledgment that the allegation cannot

[65] COVAW (n 64) paras 119-120, 172(a)-(b); Adar (n 64) 226-227.
[66] Constitution of Kenya 2010, art 244.
[67] Republic of Kenya, CIPEV Report (n 9); FIDH (n 8).
[68] Independent Policing Oversight Authority Act 2011 (Act No. 35 of 2011), s 5(b) <https://www.policinglaw.info/assets/downloads/2012_Independent_Policing_Oversight_Authority_Act.pdf> accessed 16 July 2026.
[69] See Part V above (Orengo, Osotsi); on the National Police Service statement, Tuko.co.ke (n 48).

be summarily dismissed.[69] But complicity is a considerably weightier claim than omission, and this article's evidence does not resolve it, not least because, as Part V observed, a sitting governor has proffered a competing account in which the confrontation was staged by the opposition leaders themselves. What is not seriously disputed, because the National Police Service's own statement concedes as much, is that "goonism" of some description occurred, and that the State's constitutional duty to prevent it went unmet. That omission alone suffices to ground a constitutional claim. It does not require proof of the graver allegation to be actionable.

A second failure, statutory rather than constitutional, compounds the first. When individuals are apprehended at the scene of political violence, as fourteen were in Kisumu and Nyahururu, the Office of the Director of Public Prosecutions has historically charged them, where charges follow at all, with ordinary offences: malicious damage to property or, at worst, robbery with violence.[70] Such charges reach only the individual wielding the machete. This is a curious exercise of prosecutorial restraint, given that Kenyan law already furnishes a considerably sharper instrument. The Prevention of Organised Crimes Act, 2010 defines an "organised criminal group" as a structured group of three or more persons, existing over a period of time, acting in concert to commit serious crimes for financial or material benefit, precisely the structure Odipo Dev's rate-card research describes.[71] Liability under the Act is not confined to the individual who materialises armed. Section 3(d) renders it an offence for a member of such a group to knowingly direct or instruct any person to commit a serious crime, and section 3(k) separately criminalises the provision of property with the intention that it be applied to the group's purposes, language that captures a financier who underwrites the disruption of a rally as readily as it captures the man who disrupts it. Conviction under either provision carries a fine of up to five million shillings or imprisonment of up to fifteen years, exposure of a materially different order from a petty-offence charge sheet. Why the ODPP has never invoked this Act against a political financier of election-related violence, in a jurisdiction that has documented the practice since at least 2010, is a question this article can pose with greater ease than it can resolve. The likeliest explanation is the same one that defeated the Special Tribunal and imperilled the ICC's witnesses: those best positioned to bring such a prosecution answer, directly or indirectly, to those who would be its defendants.

It is tempting, at this juncture, to invoke the international law doctrine of command responsibility, developed at the ICTY and ICTR and now codified in Article 28 of the Rome Statute of the International Criminal Court, under which a superior may be held criminally liable for crimes committed by subordinates within their effective control where the superior knew, or ought to have known, and failed to prevent or punish.[72] That temptation warrants resistance rather than uncritical indulgence. Command responsibility is a doctrine engineered for hierarchical military and paramilitary structures, and Kenya possesses no domestic statute that transplants it wholesale into ordinary policing or electoral politics; invoking it by name here would overstate what Kenyan law actually provides. What the doctrine offers is analogy rather than authority: a reminder that international criminal law, confronted with the identical underlying problem of superiors who profit from violence they did not personally

[70] Global Initiative (n 33).
[71] Prevention of Organised Crimes Act 2010 (Cap. 59), ss 2 (definition of "organised criminal group"), 3(d), 3(k) and 4 <https://new.kenyalaw.org/akn/ke/act/2010/6/eng@2023-12-11> accessed 18 July 2026.
[72] Rome Statute of the International Criminal Court (1998), art 28.

commit, concluded that liability must ascend rather than terminate at whoever pulled the trigger. Kenyan law need not borrow that doctrine by name to reach the equivalent result. Sections 3(d) and 3(k) of the Prevention of Organised Crimes Act already ascend on their own terms. They are simply not being deployed to that end.

VIII. Outgrown, or institutionalised? Weighing the evidence

The question this article's title poses merits resolution on its own terms, weighing the case for each proposition rather than presupposing the answer the "ghost" metaphor implies.

The case for "outgrown" is not fanciful. Kenya's 2022 general election, contested as bitterly as any in the country's history, produced a presidential petition that proceeded to the Supreme Court rather than to the street, and a losing candidate who, whatever his subsequent grievances, did not summon his supporters to arms. The Kofi Annan Foundation's own 2026 Electoral Vulnerability Index credits precisely this: Kenya's underlying institutional risk score of 45.4 sits below the Sub-Saharan African baseline of 51.1, evidence, the Foundation suggests, that Kenyan institutions can hold under duress.[73] On this reading, the events of July 2026 constitute noise around a genuinely improving signal, unsightly, but not evidence of a system regressing.

The case for "institutionalised" is, on the fuller record this article has assembled, considerably more compelling. An institution that had genuinely been outgrown would not require a rate card. Odipo Dev's research documents exactly that: a functioning market in political violence with day rates that scale according to the seniority of the client, from local council assignments to jobs commissioned by sitting Members of Parliament.[74] A discarded practice would not have expanded roughly tenfold, from thirty-three identified gangs in 2010 to 326 in 2017, nine in ten of them tied, directly or indirectly, to politics.[75] It would not recur with near calendrical precision in Bungoma and Busia in 2013, in Nairobi and the coast by 2017, and in Kisumu, Nyahururu, Keumbu and Nairobi's own cathedrals in 2025 and 2026.[76] And seventeen years after a Commission of Inquiry identified the individuals it deemed most responsible, it would not remain the case that not a single financier or political sponsor of that violence has faced a completed prosecution, whether domestically or at the ICC. Yet that is precisely the case.[77] An outgrown mechanism leaves ruins behind it. What Waki's report describes has left infrastructure: a labour supply, a payment system, a seasonal calendar, and, on the evidence of Article 244's fragility in practice, a security service that, whether through incapacity or complicity, does not reliably stand in its way.

The honest answer, then, is not that Kenya has failed to outgrow its ghost, as though maturation were merely taking longer than anticipated. It is that the country has, across seventeen years and four electoral cycles, furnished the ghost a permanent address, complete with a market rate, a recruitment pipeline, and a constitutional oversight structure that exists, demonstrably, with greater reliability on paper than on the streets of Kisumu on a Sunday morning in July.

IX. Critical evaluation: What Waki got right, and what accountability alone cannot remedy

[73] Kenyans.co.ke (n 57); People Daily (n 55).
[74] Sri Lanka Guardian (n 34).
[75] Global Initiative (n 33).
[76] Human Rights Watch (n 18); Global Initiative (n 33); Part V above.
[77] Human Rights Watch (n 28); FIDH (n 8).

Justice Philip Waki with Former President Mwai Kibaki.

It would be facile to conclude that Kenya merely failed to implement a sound plan. The more disquieting possibility, and the one this article's evidence supports, is that the plan's failure was not an accident of politics but a demonstration of precisely the problem it was designed to resolve. Waki did not naively recommend a domestic tribunal devoid of safeguards; he insisted it be rooted in the constitution and staffed with international judges and prosecutors precisely because he anticipated that an ordinary statute, enacted by an ordinary Parliament and administered by an ordinary Attorney General's office, would prove too readily captured by the very actors it was meant to hold to account.[78] Parliament vindicated that instinct by declining to pass it at all. The ICC alternative, conceived as the international-component contingency for exactly this scenario, was then defeated not by an adverse ruling on the merits but by the systematic intimidation of witnesses, the identical phenomenon that renders domestic capture of ordinary courts a hazard in the first instance.[79] Kenya's political and commercial elite did not merely defeat one accountability mechanism. It defeated two, deploying variations of the same instrument.

A fair reading of the record likewise cautions against treating accountability failure as the sole aetiology of Kenya's recurring political violence. The Global Initiative's own research is explicit that Kenya's criminal gangs are not solely the creatures of political patronage; they are equally a symptom of the country's widespread unemployment and historical injustices, which have produced millions of jobless young

[78]Human Rights Watch, '100% Waki' (n 9).
[79]Human Rights Watch (n 28).
[80]Global Initiative (n 33).

people readily available for hire in service of others' ends.[80] A strategy trained exclusively upon prosecuting financiers, however overdue, would not by itself dry up the supply of young men willing to march upon a cathedral for a thousand shillings a day. Waki's report was, in this sense, a diagnosis of the demand side of a market whose supply side, youth unemployment, land injustice and economic marginalisation, the Commission itself identified as background conditions, has, if anything, deteriorated in the years since.[81] The ghost this article describes is not merely a failure of prosecutorial will. It is the product of an economy and a political culture that continues, seventeen years on, to manufacture the very conditions for its own recurrence.

X. Conclusion

Justice Waki did not compose a history of the 2007–2008 violence so much as a warning concerning the years that would follow it, and Kenya has spent every one of the intervening years vindicating that warning in precisely the manner he hoped it would not. The chain runs unbroken from the sealed envelope of October 2008, through a Parliament that declined to legislate and an ICC prosecution that could not withstand witness interference, through the documented recurrence of hired political violence in 2013, 2017 and every electoral cycle since, to the machetes outside a Kisumu cathedral and the disputed gunshot wound of a governor's driver in Nyahururu in July 2026. Three days after those events, a statistical model constructed by the institutional descendants of Kofi Annan's mediation team affixed a figure to what Kenyans living through it already understood: an 84.1 per cent probability that the pattern persists into 2027.

Figures of that character may be read as prophecy, but they are more accurately read as an indictment of specific, identifiable choices: the choice by a Parliament in 2009 not to pass a tribunal bill it possessed the votes to pass; the choice by a government to treat evidentiary cooperation with the ICC as discretionary; the choice, in 2025 and 2026, to prosecute the fourteen young men apprehended for a Sunday's violence while the question of who financed, transported and armed them goes unposed in any charge sheet; and the daily, unremarkable choice of a security service to be, or not to be, the neutral guarantor that Articles 21, 37 and 244 require it to be.

A ghost, the old people also maintain, may be laid to rest, but only by the living who owe it something, not by those who merely fear it. Kenya has spent seventeen years fearing its ghost: erecting fences around the places he is known to frequent, budgeting for his next appearance, arresting the young men he dispatches ahead of himself. It has not yet performed the one act that would grant him rest: naming, trying and convicting those who continue to summon him. Until that changes, the ghost of Philip Waki will keep locating new thresholds. He found Naivasha and Nakuru in 2008, Bungoma and Busia in 2013, Kayole and the Coast by 2017, and Kisumu and Nyahururu on 12 July 2026. Kenya has not outgrown him. It has simply learned to lay a place for him at the table, and nothing in the record this article has assembled suggests it intends to clear it.

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[81] ReliefWeb (n 14).

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MAGISTRATE FAITH MUTUKU'S BACKLASH

The robed and the damned: When Kenya's judiciary eats its own

By Aromo Marion

There is a certain theatre to the Kenyan judiciary, the wigs, the gravitas, the almost religious invocation of "justice for all." Yet, behind this carefully maintained image of respectability, something more troubling is happening. We are witnessing a slow erosion of public faith, not by the blunt instrument of executive overreach, but by the more rot of judicial self-infliction. The backlash against Magistrate Faith Mutuku is not mere accusations; they are symptoms of a systemic crisis. When compared to the widely respected Bangalore Principles and the Judicial Code of Conduct, the current situation is not just embarrassing, it poses a serious threat to the justice system.

The backlash against Magistrate Faith Mutuku by the Law Society of Kenya (LSK) serves as a masterclass in how quickly the narrative can turn. The genesis that lit this fire came during a viral video recorded on July 22, 2026, when Magistrate Mutuku told advocates on record that she was *"forced to work in Nakuru"*. Imagine being an advocate standing before a judge who just told the world she doesn't want to be there. The LSK Rift Valley Branch, alongside its Nakuru Chapter, argued that a judicial officer expressing reluctance to serve cannot be trusted to handle litigants' cases impartially. They saw it as a direct insult to the legal profession and a danger to justice itself. I see it too, not because a judicial officer must love every station they are posted to, but because public expressions of reluctance can easily create doubt about whether litigants will receive the same fairness and attention they deserve. When confidence in a judicial officer begins to waver, the damage goes beyond one courtroom; it affects the public's trust in the justice system itself.

The advocates didn't just write letters; they took action. They organized a formal protest and marched to the magistrate's chambers to present their demands. Then, they went a step further and announced a full boycott of her court. This is a nuclear option for lawyers. They essentially said they will not bring any client before this magistrate until she is transferred. It shuts down the court and forces the judiciary to pay attention.

This is where the Bangalore Principles come in hand. One of the most important rules is that judges must avoid not just impropriety, but even the mere appearance of impropriety. When a magistrate says she was "forced" to be there, it creates that exact appearance. It plants a seed of doubt in the mind of every accused person and every advocate. The principle of Judicial Impartiality demands that a judge's decisions be based solely on the law and facts, not on personal feelings about their posting. That seed of doubt is a poison for public trust.

What exactly are judicial officers supposed to do? The answer is written in the Judicial Code of Conduct and Ethics. Judicial officers are expected to perform their duties without bias or prejudice, to maintain order, decorum and courtesy, and to accord the right to be heard to every person. Their official and private conduct must uphold the dignity of the Judicial Service . This means they cannot be swayed by partisan interests, public uproar, or, importantly, their own personal feelings about their job posting . The judiciary is considered a "public trust" arm and every interaction a judicial officer has, whether on the bench or in a casual conversation, must reaffirm the people's faith in its integrity.

The Judicial Code of Conduct goes into remarkable detail. It prohibits judges from bullying any person, defines bullying as "repeated offensive behaviour which is vindictive, cruel, malicious or humiliating. The message is clear: a judge is not an ordinary citizen. They are held to a higher standard because their office demands it.

While the LSK's reaction was swift and fierce, the concerns about judicial conduct have been echoed at the highest levels of the legal profession. The late Pheroze Nowrojee, SC, a man celebrated for his unwavering commitment to justice, offered a timeless warning about judicial arrogance. He spoke of a court that "lapses into invective, sometimes against a party, sometimes against counsel," describing this as "an old disease" that "invites disrespect for the Court without more". Nowrojee cautioned that when such conduct becomes a symptom of a larger pathology, it threatens "our constitutional order and the Rule of Law itself". This was not a theoretical concern. It was a prophetic warning for the very kind of incident we saw in Nakuru.

The cumulative effect of these incidents is devastating. They are not isolated scandals; they are a mosaic of dysfunction. When the public sees a Judicial Officer stating that she doesn't want to be in her station, they question the fairness of every case she hears. When they see the LSK, the bar association, at war with a specific J.O, they see a family tearing itself apart.

Magistrate Mutuku's case is a painful lesson that a judge's job is not just about reading the law correctly. It's about carrying themselves in a way that makes the public believe in the law. The backlash was swift and fierce because the lawyers understood the stakes. If the commission does not move this magistrate, it sends a terrible message: *that the judiciary will tolerate officers who disrespect their own offices and the people they are meant to serve.* In the end, the judiciary must realize that it cannot be a gatekeeper of justice if it refuses to clean its own house. The robes may grant them power, but without the moral authority derived from the Bangalore Principles and a strict adherence to the Code, those robes are just expensive costumes in a tragedy that only ends with the death of public trust.

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Clause 8(4) of the Referendum Bill 2026: The presidential determination the courts never settled

By Ian P. Kerina Mochama

1. Player and Umpire: An Argument the Courts never actually settled

Something has been bothering Kenyan judges since 2021. None of the courts that have looked at it have agreed on what to do about it. The question is narrow but consequential: read together, do Articles 255(1), 256(5), and 257(5) and (10) give the President a real, substantive judgment call over whether a constitutional amendment goes to referendum? Or is it something closer to a formality he is simply obliged to perform? The High Court touched it. So did the Court of Appeal. So did the Supreme Court, in the course of the BBI litigation. What came out the other end was not a rule. It was a live disagreement one the Supreme Court's own final orders never actually required it to resolve.[1] And that disagreement is precisely the terrain Clause 8(4) of the Referendum Bill, 2026 now legislates over, seemingly without noticing it is there.[2]

Start with where the language comes from. Confronting the question of whether the President could initiate a constitutional amendment through popular initiative, the five-judge High Court bench in *Ndii* found a structural problem that had nothing to do with the ordinary who may initiate debate.[3] The constitutional design gives the President the ultimate role in assenting to Bills and facilitating the final stages of an amendment. If the President is also the Bill's author, the Court reasoned, he ends up holding two incompatible positions in the same contest: granting him both the roles of the promoter and the referee.[4]

The Court of Appeal agreed on appeal. The Supreme Court later describes this as part of the finding by the two superior courts.[5] Settled, then? Not quite. What the seven Justices did with that shared finding is where things get interesting, because they did not treat it as settled at all. Koome CJ, writing the lead judgment, adopted it. Reading Articles 256(5) and 257(10) together, she found that they cast the President in a guardianship role over the amendment process, one that, in her words, ought not to be undertaken by a player in the amendment process.[6] This was

[1][2022] KESC 8 (KLR) [2117] (Final Orders).
[2]The Referendum Bill, 2026 (Senate Bills No 3 of 2026) cl 8(4) https://new.kenyalaw.org/akn/ke/bill/senate/2026-02-12/the-referendum-bill-2026/eng@2026-02-12 accessed 9 August 2026.
[3][2021] KEHC 9746 (KLR) [491]– [492].
[4]ibid [492].
[5][2022] KESC 8 (KLR) (Koome CJ & P) [244].

one of three reasons she gave for excluding the President from popular initiative, not a freestanding holding. But she went out of her way to adopt the lower courts' own language rather than merely cite it, writing that she therefore endorses[d], the finding by the two superior courts that the President ought not to be both a player and umpire in the amendment process.[7]

Ibrahim SCJ got to the same place independently, putting it even more sharply. Examining the constitutional amendment tracks under Chapter Sixteen, he noted that the architecture assigns the President crucial roles in facilitating the final stages of a referendum, and that power cannot rest with someone who also has a personal stake in the outcome: 'we cannot have the President playing the role of umpire, who is expected to be neutral and act in the interests of the nation, in a process where he is also a player advocating for his own personal interests and agendas. Clearly, there would be a serious conflict of interest.'[8]

Mwilu Deputy Chief Justice read the same provisions. She landed, more or less, on the opposite conclusion and got there by quoting the lower courts' own language before rejecting it outright. "I respectfully disagree with the superior court on the finding," she wrote. The President's role here, as she read it, "is ceremonial. Though an important role, it is a formality." Articles 256 and 257 impose "not discretionary functions. They are mandatory and time-bound and do not give the President any power... to determine whether or not a referendum is to be held."[9] If she is right, there is nothing here for a self-interested President to abuse in the first place. The outcome is fixed the moment a qualifying Bill lands on his desk. Whoever wrote it.

That is the Chief Justice and the Deputy Chief Justice, the two most senior members of the bench disagreeing with each other over the character of the exact power in question. Not a majority-versus-dissent split. Both land on the same side of the case's outcome in the end. Just a genuine, unresolved difference in how each of them understands what the President is actually doing when Article 257(5) puts a Bill in front of him.

Ouko SCJ reaches a related but not identical concern and gets there from a completely different direction. He treats Article 257 as something like a relay race: the citizen-promoters, the IEBC, the county assemblies, Parliament and the President each run one leg and hand off to the next.[10] A President who is also the initiator would be running two legs of the same race, first as citizen-promoter, later as the officeholder deciding whether to send the Bill to referendum. His objection is less about conflicted motives than about a structural mismatch of roles: "He cannot, as they say, run with the hare and hunt with the hounds."[11]

Then there is the silence worth noting. Njoki Ndungu SCJ was the sole dissenter on the general question of whether the President may initiate a constitutional amendment

[6]Ibid at para 244.
[7]Ibid at para 244.
[8]*Attorney-General & 2 Others v David Ndii & 79 Others*, Petition No 12 of 2021 (Consolidated).
[9]*Attorney-General & 2 Others v David Ndii & 79 Others*, Petition No 12 of 2021 (Consolidated) \(2022\) KESC 8 (KLR) at paras 458–459 (Mwilu DCJ & VP) Kenya Law Supreme Court Portal (accessed 9 August 2026).
[10]*Attorney-General & 2 Others v David Ndii & 79 Others*, Petition No 12 of 2021 (Consolidated) \(2022\) KESC 8 (KLR) (Mwilu DCJ & VP) Kenya Law Supreme Court Portal (accessed 9 August 2026).
[11]*Attorney-General & 2 Others v David Ndii & 79 Others*, Petition No 12 of 2021 (Consolidated) \(2022\) KESC 8 (KLR) at para 1917 (Ouko SCJ), available at Kenya Law Supreme Court Portal (accessed 9 August 2026).

through popular initiative at all.[12] That made her the one judge on the bench with the clearest institutional reason to take on Koome CJ and Ibrahim SCJ's conflict-of-interest reasoning head-on. She discusses Articles 256(5) and 257(10) in her own opinion. But only descriptively, setting out what the provisions say, not what they mean for this specific problem.[13] Her actual case for presidential initiation is built elsewhere, out of Article 132(1)(c)'s language on presidential duties and Article 1's account of where sovereign power originates.[14] The player-and-umpire question simply never comes up. Not once, in either direction.

None of this had to be resolved for the case to be decided. In *Ndii*, the majority held that the President was, in fact, the Bill's promoter, making the deeper dispute about his final referendum duties irrelevant to the final outcome. The internal disagreement instead shaped how individual judges voted on the evidence of initiation. As recorded in the final orders, only Ndungu and Lenaola SCJJ dissented on whether the President in fact initiated the process in issue of a narrower, fact-specific question distinct from the general principle.[15] Which is why it remains exactly where the Supreme Court left it in March 2022: unsettled, five judges deep, argued in at least three distinct registers substantive conflict of interest, ceremonial formality, structural incompatibility with a fourth judge who might have unsettled it further simply choosing not to engage.

Clause 8(4) walks directly into that terrain. It instructs the President that if a Bill "relates to a matter specified under Article 255(1)," he must send it to referendum; if it does not, he assents within seven days.[16] Nothing in it says whether that determination is the kind of judgment a self-interested actor could bend, or a mechanical step no one could meaningfully abuse, any more than the Constitution itself said. The Bill inherits the Court's disagreement. It does not settle it.

2. What Clause 8(4) actually does and what it never decides

Read on its own, Clause 8(4) looks unremarkable. Almost boring, even. Once a Bill amending the Constitution by popular initiative has cleared the county assemblies and both Houses of Parliament, the Speakers jointly submit it to the President, who must then act within a fixed window: if the Bill relates to a matter specified under Article 255(1) of the Constitution, he has thirty days to notify the IEBC to conduct a referendum before he may assent; if it does not, he simply assents within seven days.[17] Nothing in the subsection says who checks that determination. Nothing says on what basis it is made. Nothing says what happens if a President inclined to avoid a referendum simply decides, wrongly, that Article 255(1) is not engaged. The drafters inherited exactly the dispute canvassed in Section I. They did not resolve it. They may not have even known it was there to resolve.

That last point is not rhetorical. The Bill's own structure suggests the drafters treated the two constitutional pathways to a referendum as if they raised different

[12] ibid [2117] (Final Orders, item (ii)(a)).
[13] *Attorney-General & 2 Others v David Ndii & 79 Others*, Petition No 12 of 2021 (Consolidated) \(2022\) KESC 8 (KLR) at paras 1339–1340 (Njoki Ndungu SCJ), available at Kenya Law Supreme Court Portal (accessed 9 August 2026).
[14] *Attorney-General & 2 Others v David Ndii & 79 Others*, Petition No 12 of 2021 (Consolidated) \(2022\) KESC 8 (KLR) at paras 1191–1192, 1197 (Njoki Ndungu SCJ), available at Kenya Law Supreme Court Portal (accessed 9 August 2026).
[15] *Ibid* at para 2117 (Final Orders, item (ii)(b)–(c)).
[16] The Referendum Bill, 2026 (Senate Bills No 3 of 2026) cl 8(4)(a)–(b).
[17] The Referendum Bill, 2026 (Senate Bills No 3 of 2026) cl 8(4)(a)–(b).

problems, when on this specific question they raise the same one. Clause 5, which operationalises the parliamentary route under Article 256(5)(a), reads: 'Whenever it is necessary to hold a referendum to amend the Constitution in relation to a matter specified in Article 255(1) of the Constitution, the President shall, within thirty days of the receipt of the Bill from Parliament, notify the Commission to conduct a referendum within ninety days.'[18] Necessity, in Clause 5, is simply assumed. The provision is written as though the question of whether a referendum is required has already been settled by the time the Bill reaches the President, and his role is purely to act on it. Clause 8(4), covering the popular-initiative route, reads differently, and the difference matters: it is the President himself who is given the if… relates… if… does not relate determination, framed as a live choice between two branches rather than a foregone conclusion.[19] Same constitutional question. Two different textual treatments and the Bill never explains why, or offers any standard for the branch it leaves entirely to his judgment.

The Bill compounds this with an odd piece of internal labelling. Clause 9 is headed Bill to amend the Constitution relating to a matter specified in Article 255(1) of the Constitution, which, read against Clauses 5 and 8(4), sounds like exactly the provision that would settle how the Article 255(1) determination is meant to work.[20] It is not. Clause 9 has nothing to do with who decides whether a referendum is required. It governs something else entirely: how a parliamentary-initiative Bill touching Article 255(1) is to be "formulated in a participatory and inclusive manner" and what Parliament does when there are competing draft Bills, which it may merge, choose between, or put to a vote as separate options.[21] A reader working from the Bill's own arrangement of clauses, looking for where the Article 255(1) question gets addressed head-on, would reasonably expect to find it there. It isn't.

The Memorandum of Objects and Reasons does little to dispel the impression that this particular junction did not get much attention. It explains Clause 5 as providing for the notification of the Commission by the President of a referendum to amend the Constitution in relation to matters specified in Articles 255(1) and 257(10) of the Constitution, invoking Article 257(10), which belongs to the popular-initiative track, to describe a clause that is by its own heading implementing the parliamentary track under Article 256(5)(a).[22] It then moves from explaining Clause 7 and 8 together, in a single sentence about county assemblies and Parliament, straight to Clause 10 on the referendum question. Clause 9 and the presidential determination buried inside Clause 8(4), pass without a mention. Not a word.[23] None of this proves the drafters were careless generally; the Bill runs to forty-two clauses and two schedules and most of it is procedural detail assembled competently enough. But on the one clause that operationalises the precise power five Supreme Court justices could not agree how to characterise, the Bill's own account of itself is imprecise and silent exactly where it most needed to be specific.

None of this is a new complaint about Kenyan referendum legislation, either.

[18]ibid cl 5.
[19]ibid cl 8(4).
[20]ibid cl 9, heading.
[21]ibid cl 9(1), (3).
[22]Memorandum of Objects and Reasons to the Referendum Bill, 2026 (Senate Bills No 3 of 2026).
[23]ibid, paras on Clauses 7-8 and Clause 10 respectively.

In 2020, reviewing an earlier BBI-era referendum bill with a different clause structure but the same underlying design, Waikwa Wanyoike and Jill Cottrell Ghai raised the same open question Clause 8(4) still leaves standing: who decides that a referendum is actually required, whether Parliament would ever flag a self-serving omission and what becomes of a President who simply declines to trigger one, including, as they pointedly noted, a Bill removing his own term limit. Their proposed fix was a judicial certification process on whether there is a need for a referendum.[24] No such process exists in the 2026 Bill. None. Six years, one High Court judgment, one Court of Appeal judgment and a Supreme Court decision split five ways later. The question they asked about a bill that never became law is, in substance, the same question Clause 8(4) raises about the one that might.

Two readings, then. Two very different bills wearing the same text. If Mwilu DCJ is right that this determination is a ceremonial formality with no real discretion in it, Clause 8(4) is unobjectionable: mechanical, time-bound, nothing here to abuse.[25] If Koome CJ and Ibrahim SCJ are right that it is a substantive judgment call capable of serious conflict of interest when the President has a stake in the outcome, then Clause 8(4) hands him exactly that judgment call, on exactly the same bare relates to / does not relate to language the Constitution itself uses, with no certification process, no reviewing body and no standard beyond his own reading of Article 255(1).[26] Commentary on the Bill has described it as an attempt to close legal gaps the courts exposed during the Building Bridges Initiative litigation.[27] On this particular gap, it does not so much close it as legislate directly over the crack.

3. What is sitting before a bench right now

Everything in Sections I and II could be dismissed as academic. A disagreement among long-dead paragraphs of a 2022 judgment, applied to a Bill that hasn't yet become law. Except it isn't academic. As of this writing, a different constitutional amendment, brought under a different provision, is frozen in exactly this uncertainty, pending before a bench the Chief Justice has not yet even empaneled.

The Bill is the Constitution of Kenya (Amendment) Bill, 2025. It descends from a presidential memorandum dated 9 December 2022 and it proposes to do three things: implement the two-thirds gender rule, create the office of Leader of the Opposition and entrench three public funds directly into the Constitution the Constituency Development Fund, the Senate Oversight Fund and the National Government Affirmative Action Fund.[28] It proceeds through Parliament under Article 256, the parliamentary-initiative track.[29] That

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[24]Waikwa Wanyoike and Jill Cottrell Ghai, 'There are problems with the Referendum Bill' *The Star* (Nairobi, 6 June 2020) https://www.the-star.co.ke/siasa/2020-06-06-there-are-problems-with-the-referendum-bill/ accessed 8 August 2026; republished at Katiba Institute, 'There are problems with the Referendum Bill' https://katibainstitute.org/there-are-problems-with-the-referendum-bill/ accessed 8 August 2026.
[25]*Attorney-General & 2 Others v David Ndii & 79 Others* [2022] KESC 8 (KLR) https://new.kenyalaw.org/akn/ke/judgment/kesc/2022/8/eng@2022-03-31 accessed 9 August 2026.
[26]*ibid* (Ibrahim SCJ) [791]; (Koome CJ & P) [244].
[27]'Kenyan senate seeks public input on referendum bill to streamline voting rules' (*Constitution Net*, 12 May 2026) https://constitutionnet.org/news/kenyan-senate-seeks-public-input-referendum-bill-streamline-voting-rules accessed 8 August 2026.
[28]Katiba Institute & 4 others v Attorney-General & 3 others; Inuka Kenya ni Sisi & another (Interested Parties) (Petition E234 of 2025) [2025] KEHC 12779 (KLR) (Constitutional and Human Rights) (18 September 2025) (Ruling) (Mugambi J) https://new.kenyalaw.org/akn/ke/judgment/kehc/2025/12779/eng@2025-09-18 accessed 9 August 2026,
[29]The Referendum Bill, 2026 (Senate Bills No 3 of 2026) cl 5.

matters, because it means this particular Bill, if it ever reaches the President, falls under Clause 5 of the Referendum Bill, 2026, not Clause 8(4). Clause 5 is the one Section II showed has no branching language at all no if it relates, if it does not relate. It simply assumes, silently, that someone has already worked out whether a referendum is needed. Nobody has.

Katiba Institute filed Petition E234 of 2025 to say so. Its core claim: Parliament has gone fourteen years without enacting the referendum law Article 82 contemplates and no constitutional amendment should proceed until that gap is filled.[30] The dispute is not abstract even on its own facts. The ruling records that the President has already taken a position on the precise question this paper is about: he opined that in his view the fund-enrenchment amendments would not require a constitutional amendment referendum under Articles 255(1) and 256(5) a determination Katiba Institute disputes directly.[31] This is not a future risk being war-gamed in a law review. It is the exact determination Clause 8(4) hands to the President, already made, already contested, already sitting unresolved in front of a court. Among the specific declarations Katiba Institute seeks is one asking the court to require that any future referendum law ensure that a mechanism is provided for contesting the classification of a Constitution Amendment Bill as either relating to or not relating to the entrenched provisions.[32] That is, more or less, this paper's argument, filed as litigation, fifteen months before this section was written.

On 18 September 2025, Justice Mugambi agreed the threat was real enough to act on. He issued a conservatory order forbidding the Bill's transmission to the President for assent and referred the file to the Chief Justice for empanelment of an uneven-numbered bench under Article 165(4).[33] His own reasoning is direct if the amendments proceed and are assented to the changes will become Constitutional provisions which by dint of Article 2(3) will be beyond any legal challenge, rendering the Petition nugatory even if it eventually succeeds.[34] In support, he recorded a passage attributed to the BBI High Court case, describing the precise mechanism at issue here: a President who takes the view that a given Bill does not touch the entrenched provisions may simply assent to it and that assent alone is enough to trigger Article 2(3)'s shield against future challenge.[35]

The High Court's own 2021 judgment, in the very passage Mugambi J later relied on, explicitly declined to resolve whether challenging the process leading to presidential assent is the same as challenging the validity or legality of the Constitution under Article 2(3), calling it a matter that is not properly before us.[36] What the High Court did find was that the Applicants' fear was not unfounded, that the view that assent might inoculate an amendment from later challenge is a reasonable one which may well prevail.[37] Mugambi J treated that same risk as real

[30] [2025] KEHC 12779 (KLR) [2](f)-(h).
[31] *Ibid* at para 58.
[32] *ibid* para [2](k).
[33] *ibid* para [107] (Order).
[34] *ibid* para [96]- [97].
[35] *ibid* para [36], attributing the passage to David Ndii & others v Attorney General & others [2021] KEHC 9746 (KLR) https://new.kenyalaw.org/akn/ke/judgment/kehc/2021/9746/eng@2021-05-13.
[36] *Ibid* para 34.
[37] [2025] KEHC 12779 (KLR) [96]-[97].

enough, on its own, to justify a conservatory order in 2025.[38] So the honest position is not that Article 2(3) definitely forecloses every later challenge to a wrongly-made classification Kenyan courts have not conclusively decided that but that two separate High Court proceedings, four years apart, have each treated the possibility as serious enough to act on rather than dismiss. What is a wrong or manipulated answer to whether this touches Article 255(1)? risks costing, whether or not the outer question of Article 2(3)'s full reach is ever finally settled.

Which returns us to Clause 8(4) and to Clause 5 beside it. Neither one asks who checks the President's determination, because as of this Bill's drafting, nobody had to. There was no referendum statute to write a check into. The 2026 Bill exists, on its own account, to close that exact gap. Petition E234 is, in effect, a live demand that Parliament actually do so, filed against a different Bill, under a different constitutional track, arguing for a mechanism that would apply equally to both. As Sections I and II showed, the drafters had two live judicial accounts of what the President's role in this determination even is before them: a substantive judgment call carrying serious conflict of interest, or a ceremonial formality incapable of being abused.[39] Clause 8(4) does not choose. Clause 5 does not even ask the question. And somewhere in the High Court, on a bench not yet named, a case is waiting that will have to choose whether the answer matters, whether Parliament finally supplied one, or left it exactly where the courts found it: undecided and now, not for lack of trying to.

4. Four amendments, not a new institution

So, the gap is real and it is not waiting for a future case to matter. Two questions follow. Is there already a remedy hiding somewhere in the Bill's own text? And if not, does fixing it require importing something foreign to Kenyan referendum law, or is the material already lying around?

Start with the first question, because Section II left a thread dangling. Ordinary constitutional litigation, under Articles 22, 23 and 258, is always theoretically open to anyone who thinks the President got the Article 255(1) call wrong.[40] But the Bill also builds its own dedicated petition machinery, in Part IV and it is worth asking whether that machinery actually reaches this scenario, or only looks like it does. Clause 20 lets a person petition to question the conduct, result and validity of a referendum, or to seek a declaration on any matter relating to the referendum, within fourteen days of the results being declared or of the event complained against.[41] Read quickly, subsection (b) sounds broad enough to catch a presidential decision not to hold a referendum at all. Read against Clause 2's own definition, it probably isn't. A referendum is defined as a poll held under this Act.[42] A poll that never happened is hard to fit inside a definition built around one that did. Whether a Clause 8(4)(b) assent-without-referral counts as any matter relating to the referendum when there was no referendum to relate to is a genuine interpretive question and the Bill gives no indication its drafters ever asked it.

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[38] *Attorney-General & 2 Others v David Ndii & 79 Others* [2022] KESC 8 (KLR).
[39] Constitution of Kenya 2010, art 22, art 23, art 258.
[40] The Referendum Bill, 2026 (Senate Bills No 3 of 2026) cl 20(2)– (3).
[41] *ibid* cl 2 (definition of "referendum").
[42] *ibid* cl 2 (definition of "referendum").

Now the harder constraint, and it must be dealt with before any fix is proposed, not after. Article 256(5) of the Constitution does not merely permit the President to make the Article 255(1) call, it assigns it to him by name for the parliamentary track, providing that where a Bill relates to a matter specified in Article 255(1), 'the President shall, before assenting to the Bill, request the [IEBC] to conduct... a national referendum.' While the popular-initiative track under Article 257(10) is less textually explicit, the Referendum Bill, 2026 attempts to mirror this exact executive gatekeeping function.[43] An ordinary Act of Parliament cannot reassign a function the Constitution itself vests in a named office. Whatever the Referendum Bill does about this problem, it cannot simply hand the determination to the IEBC or to a court instead of the President, however tempting that looks on paper. That rules out the most obvious-seeming fix. It does not rule out regulating, by statute, the procedure the President follows in exercising a power the Constitution still leaves with him and that distinction is where the actual room to work sits.

The Bill already shows Parliament is comfortable with procedural discipline of exactly this kind, just aimed at a different actor. Before a popular-initiative Bill goes anywhere near a county assembly, the IEBC must verify the signatures and separately satisfy itself that the initiative meets the requirements of Article 257 and if it isn't satisfied, it must notify the promoters in writing within seven days.[44] Nobody in this Bill seems to have thought a written, time-bound explanation was an unreasonable thing to ask of an institution making a threshold constitutional call. It simply never occurred to the drafters to ask the same of the President's later, higher-stakes determination. Four changes, each anchored in something already in the Bill, the Constitution, or the rules of court, would close that gap without touching the presidential function itself.

First, require reasons. A new Clause 8(4A): Before acting under subsection (4), the President shall cause to be published in the Gazette a statement of reasons for the determination made under paragraph (a) or (b). This borrows Clause 6(3)(b)'s own logic written reasons, published, time-bound and applies it one office higher up the same pipeline.[45]

Second, build in time to act but inside the ceiling the Constitution itself sets, not past it. This is the one place a careless fix could do real damage: Article 256(4) requires the President to assent within thirty days after the Bill is enacted by Parliament and Article 257(9) imports that same thirty-day ceiling into the popular-initiative track by name.[46] An amendment that made assent conditional on a delay running from whenever the reasons statement happens to be published with no outer bound could easily push total elapsed time past thirty days and put the statute itself in conflict with the Constitution it is meant to be operationalising. The fix has to stay inside that ceiling, not outside it. Clause 8(4)(b) currently gives the President seven days to assent once he decides a Bill doesn't touch Article 255(1); that leaves twenty-three of the constitutional thirty days completely unused. Redraft it: The President publishes the statement of reasons under subsection (4A) within seven days of receiving the Bill,

[43]Constitution of Kenya, 2010, arts. 256(5) & 257(10).
[44]The Referendum Bill, 2026 (Senate Bills No 3 of 2026) cl 6(2)(c), cl 6(3)(b).
[45]*ibid* cl 6(3)(b).
[46]Constitution of Kenya 2010 art 256(4).

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then assents not earlier than the twenty-first day and not later than the thirtieth day, after receiving the Bill, in accordance with Article 256(4) of the Constitution as read with Article 257(9). That produces a fixed fourteen-day window day seven to day twenty-one during which the reasons are public and nothing irreversible has happened yet, deliberately matched to the fourteen days Clause 20(3)(a) already gives for challenging a referendum's result and it never asks the President to do anything the Constitution doesn't already permit him thirty days to do.[47] Clause 5, which governs the parliamentary track and currently has no delay provision of any kind, needs the identical structure, this is not a hypothetical gap. It is the exact clause Petition E234 sits under right now.[48]

Third, close the standing question rather than leave it to be litigated from scratch. A new Clause 20(2A): For the avoidance of doubt, a petition under this Part includes a challenge to a determination under Clause 5 or Clause 8(4) that a Bill does or does not relate to a matter specified in Article 255(1) of the Constitution. This resolve, by text, the ambiguity identified above rather than waiting for a court to resolve it under time pressure.

Fourth and this is the one that actually solves the speed problem Section III's own account of Petition E234 exposes: make clear that urgent relief does not have to wait for the slow part of the process. Article 165(4) only requires a multi-judge bench once a matter is certified by the court as raising a substantial question of law that certification is not automatic and a single judge already has jurisdiction under Article 165(3)(d) to grant interim relief before it happens.[49] Rule 13 of the Mutunga Rules already allows a petition filed under certificate of urgency to go straight before a judge for orders.[50] What actually slowed Petition E234 down was not the conservatory order Mugambi J issued that promptly it was the multi-judge empanelment for the full merits hearing, which is still pending a year later.[51] A clause making this explicit removes any doubt: Nothing in this Act precludes a person from applying for conservatory orders under Articles 22, 23 and 258 of the Constitution in respect of a determination under Clause 5 or Clause 8(4), and such an application may be placed before a single Judge under rule 13 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms)

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[47]The Referendum Bill, 2026 (Senate Bills No 3 of 2026) cl 20(3)(a).
[48]Katiba Institute & 4 others v Attorney-General & 3 others; Inuka Kenya ni Sisi & another (Interested Parties) (Petition E234 of 2025) [2025] KEHC 12779 (KLR).
[49]Constitution of Kenya 2010, art 165(3)(d), (4).
[50]The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Legal Notice No 117 of 2013), r 13.
[51][2025] KEHC 12779 (KLR) [107] (Order).

Practice and Procedure Rules, 2013, without awaiting certification or empanelment under Article 165(4). Article 258 is worth naming specifically alongside 22 and 23: a wrongful classification under Clause 5 or 8(4) is not obviously a Bill of Rights claim, which is what Articles 22 and 23 are built around, so the broader general-enforcement right in Article 258 every person has the right to institute court proceedings, claiming that this Constitution has been contravened is the more precise anchor for standing here, with 22 and 23 available as a fallback wherever the challenge can also be framed as a denial of the right to vote in a referendum.[52] Paired with the first three changes, this gives a litigant something concrete to challenge, an unambiguous right to bring the challenge, enough time to file it and an explicit route to the one part of the Kenyan judicial process that has already proven, in this exact litigation, that it can move fast.

None of this requires inventing an institution, borrowing a foreign model, or asking Parliament to do something it has no power to do. It requires four insertions, each traceable to a provision that already exists. Katiba Institute has already asked, in Petition E234, for a mechanism... for contesting the classification of a Constitution Amendment Bill.[53] The 2026 Bill was Parliament's chance to supply one before a court forced the issue. On the evidence of Clauses 5, 8 and 9, examined closely in Section II, it did not take that chance. The four changes above are not a call for Parliament to think of something new. They are a list of what it would need to stop leaving out.

Chief Justice Martha Koome

Conclusion

The Referendum Bill, 2026 was in the Senate's Committee of the Whole, having passed Second Reading the day before.[54] That is not a rhetorical flourish. It is the single fact that separates everything argued above from an academic exercise. Clause 8(4) is not a hypothetical provision awaiting some future Parliament's attention. It is text currently being considered, clause by clause, by sitting legislators, any one of whom could move an amendment this week that this paper's fourth section already sketched the shape of.

Pull the argument together. The Supreme Court never decided whether the President's power to trigger a referendum under Article 255(1) is a substantive judgment call or an empty formality; Koome CJ and Ibrahim SCJ said one thing, Mwilu

[52]Constitution of Kenya 2010, art 258(1).

[53][2025] KEHC 12779 (KLR) [2](k).

[54]'Parliamentary Round-Up' (*Vellum Kenya*, 7 August 2026) https://vellum.co.ke/parliamentary-round-up-99/ accessed 9 August 2026, recording the Referendum Bill (Senate Bills No 3 of 2026) at Second Reading on Tuesday 4 August 2026 and Committee of the Whole on Wednesday 5 August 2026.

Parliament has a central role both in creating the referendum framework and in constitutional amendment processes that may lead to a referendum. The Referendum Bill, 2026 (Senate Bills No. 3 of 2026) is intended to establish a permanent and comprehensive legal framework for conducting referenda in Kenya.

DCJ said the other and the disagreement was never before the Court to resolve. Clause 8(4) inherits that unresolved question and answers it by not answering it: it hands the President the same bare relation to / does not relate to language the Constitution already used, with no standard attached and no institution positioned to check the result. This is not a distant risk. A structurally identical determination, over a different Bill, is right now the subject of a conservatory order, an empanelled bench and a live argument that Parliament cannot even attempt a constitutional amendment until this exact gap is closed.[55] And the closing move is not hard to find. The Bill's own drafters were willing to let the IEBC certify a threshold constitutional question earlier in the same process; they simply never asked whether the President's later, higher-stakes determination deserved the same discipline.

None of this required speculation to establish. It required reading four judgments, one Bill and one live petition closely enough to notice what each of them does and does not say and, that is not incidental to the argument. A paper arguing that Parliament left a gap because nobody checked the details carefully enough would be a strange place to leave uncorrected details of its own.

Whether Clause 8(4) passes this session in its current form, or gets amended, or gets left exactly as drafted while the courts eventually do what Parliament declined to, the underlying question does not go away on its own. Somebody, at some point, is going to have to decide whether the President's word on Article 255(1) is a fact to be trusted or a judgment to be checked. The Constitution asked that question in 2010. The BBI courts argued about it without settling it in 2021 and 2022. Katiba Institute is asking it again right now, in a courtroom, over a different Bill, waiting on a bench that has not yet been named. The only body that has not yet been forced to answer it is the one currently best placed to: The Committee of the Whole, this week, with the text open in front of it.

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[55]Katiba Institute & 4 others v Attorney-General & 3 others; Inuka Kenya ni Sisi & another (Interested Parties) (Petition E234 of 2025) [2025] KEHC 12779 (KLR).

The resource curse reimagined: Will the Dangote Lamu refinery empower local communities or institutionalise marginalisation?

By Donald Nyongesa

Aliko Dangote owner of Dangote Industries.

Abstract

Lamu Old Town has stood on Kenya's northern coast for the better part of seven centuries, inscribed by UNESCO in 2001 as evidence that a Swahili trading culture could flourish there without industrial machinery. In July 2026, Dangote Industries selected Lamu as the site of a $17 billion, 700,000-barrel-per-day oil refinery, the largest private investment in Kenyan history and the second anchor, after Lekki, of a two-coast refining empire spanning the continent. Within weeks, a constitutional lawyer had threatened High Court action over the absence of public participation, Greenpeace Africa was weighing a legal challenge to the environmental approval process, and Lamu's own Council of Elders had begun grassroots mobilisation against a project many residents first learned of through press releases rather than consultation. This is not Lamu's first encounter with mega-infrastructure: in 2018, the High Court awarded local fishing communities KES 1.7 billion for the state's failure to consult them before constructing the Lamu Port a decade earlier. This article argues that Kenya's constitutional and statutory architecture, Article 69, the Community Land Act's benefit-sharing provisions, and the Petroleum Act's local content requirements, already supplies the tools to prevent a repetition of that failure, tools considerably stronger on paper than those available to comparable communities in Nigeria's Niger Delta. Drawing on Nigeria's Host Communities Development Trusts, Ghana's tiered local-content ownership requirements, and the cautionary tale of Chevron's decades-long evasion of an Ecuadorian court judgment through investor-state arbitration, the article concludes that

whether Lamu becomes a template for equitable resource extraction or its latest casualty will turn not on the discovery of new legal rights but on whether Kenya's own regulators enforce the rights that already exist before, rather than after, the ground is broken.

I. Introduction

Lamu Old Town has occupied its stretch of the Kenyan coast for the better part of seven hundred years, its coral-stone houses and carved wooden doors sufficiently intact and sufficiently continuous a record of Swahili civilisation that UNESCO inscribed the settlement as a World Heritage Site in 2001, the first in Kenya to be so designated for its built rather than natural heritage.[1] What is now converging on that coastline is not modest by any measure available to compare it against. In July 2026, Dangote Industries confirmed that it had selected Lamu, ahead of rival sites in Tanzania and Uganda, to host a refinery designed to process 700,000 barrels of crude oil a day, financed through a combination of internally generated cash, bond issuance and a planned initial public offering, at an estimated cost that has been reported variously between KES 2 trillion and KES 2.6 trillion, in the region of $17 billion at prevailing exchange rates.[2] It would be the largest single private investment in Kenya's history, the second anchor, after the company's flagship facility in Lekki, Nigeria, of what industry observers have begun describing as a two-coast Dangote refining corridor spanning the African continent from the Atlantic to the Indian Ocean.[3] Kenya's government has committed approximately $165 million in seed capital and appointed Deputy President Kithure Kindiki to chair a coordinating committee for the project's implementation; groundbreaking is targeted for before the end of 2026.[4]

The arithmetic is intoxicating, and it is not, on its own terms, unreasonable: a country that imports nearly all of its refined petroleum products following the closure of the old Kenya Petroleum Refineries plant in Mombasa has an obvious interest in regional energy self-sufficiency, and the government's own estimates put potential employment at roughly 60,000 jobs across construction, operations and associated industries.[5] What this article asks is whether the arithmetic, however genuine, is the right measure of the project's likely consequences for the people who will live beside it, and whether the legal architecture Kenya has built since 2010 is being permitted to do the work it was designed to do before, rather than after, the concrete is poured. It proceeds in five movements: an account of the theoretical diagnosis the title borrows and reimagines; a reconstruction of Lamu's own jurisprudential memory of mega-infrastructure; an audit of the statutory architecture of consent Kenya has built since 2010; a comparative political

[1] UNESCO World Heritage Centre, 'Lamu Old Town' <https://whc.unesco.org/en/list/1055/> accessed 10 August 2026.

[2] 'How Lamu beat seven shortlisted sites to clinch Dangote refinery' (Daily Nation Nairobi, 3 August 2026) <https://nation.africa/kenya/news/how-lamu-beat-seven-shortlisted-sites-to-clinch-dangote-refinery-5542478> accessed 10 August 2026; 'Dangote eyes $17B Kenya refinery at Lamu' (Billionaires Africa, 7 August 2026) <https://www.billionaires.africa/2026/08/07/aliko-dangote-plans-17-billion-refinery-on-kenyas-lamu-island-to-end-east-africas-fuel-imports/> accessed 10 August 2026.

[3] 'Dangote Shakes East Africa With KES 2.2 Trillion Lamu Oil Refinery' (Streamline Feed, 20 July 2026) <https://streamlinefeed.co.ke/news/dangote-selects-lamu-for-regional-oil-refinery> accessed 10 August 2026.

[4] Billionaires Africa (n 2); 'Dangote-Backed Lamu Oil Refinery Set to Begin Construction in October 2026' (Kenyans.co.ke, 8 August 2026) <https://www.kenyans.co.ke/news/125997-dangote-backed-lamu-oil-refinery-set-begin-construction-october> accessed 10 August 2026.

[5] 'Kenya's Lamu refinery faces ESG and legal scrutiny as energy security ambitions collide with environmental governance' (African Sustainability Matters, 5 August 2026) <https://africasustainabilitymatters.com/kenyas-lamu-refinery-faces-esg-and-legal-scrutiny-as-energy-security-ambitions-collide-with-environmental-governance/> accessed 10 August 2026.

economy spanning Nigeria, Ghana and Ecuador; and a synthesis of what the coming months will actually require of Kenya's regulators, as distinct from what they will merely be asked to promise.

II. The anatomy of a diagnosis: Resource curse theory and the political economy of extraction

The title's borrowed term has its own history, and that history is worth recovering before it is applied to Lamu, because the term has drifted, in popular usage, into a loose synonym for "bad luck" that its originators never intended. Richard Auty coined "the resource curse thesis" in 1993 to describe the counterintuitive tendency of mineral-rich developing economies to grow more slowly, and govern themselves worse, than their resource-poor neighbours, a finding that ran directly against the development economics of the preceding decades, which had treated natural endowment as an unambiguous asset.[6] Terry Lynn Karl's subsequent study of oil-exporting states extended the diagnosis from economics into political sociology, arguing that petroleum dependence produces a distinctive institutional form, the "petro-state," in which the ease of extracting rents from a single commodity weakens exactly the bureaucratic and fiscal capacities a state needs to convert that wealth into broad-based development.[7] Michael Ross's later, more systematically quantitative treatment found the pattern to be robust across decades of cross-national data: petroleum wealth correlates with less democracy, more frequent civil conflict, and weaker outcomes for women's economic participation, not because oil is a curse in any mystical sense, but because of the specific, identifiable ways its revenues interact with weak institutions.[8]

What this genealogy yields, for present purposes, is a reorientation of the analytical question. If the curse were a property of the commodity itself, Lamu's fate would already be sealed by geology, and this article would have nothing useful to add beyond documentation. Every strand of the literature this section has traced converges instead on an institutional, rather than a mineralogical, explanation: the curse is not the oil. It is the absence of institutions strong enough to insist that the oil answer to them. That reorientation is what licenses this article's central wager, that the outcome for Lamu remains genuinely open, contingent on facts that have not yet been settled, rather than foreordained by the size of the investment now approaching its shoreline.

III. Lamu's jurisprudential memory: Compulsory acquisition, Baadi, and the standard of anticipatory participation

Lamu's relationship with mega-infrastructure did not begin with Dangote, and the county's own institutional memory of how such projects tend to unfold is neither theoretical nor distant. The Lamu Port, the first physical component of the Lamu Port-South Sudan-Ethiopia Transport corridor, was constructed through a sequence of compulsory land acquisitions beginning in 2013, when residents were displaced to build the county government headquarters, followed in 2016 by acquisitions in Kililana for the port itself and further acquisitions for an associated coal power project; in each instance, affected communities complained

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[6]Richard M Auty, Sustaining Development in Mineral Economies: The Resource Curse Thesis (Routledge 1993).
[7]Terry Lynn Karl, The Paradox of Plenty: Oil Booms and Petro-States (University of California Press 1997).
[8]Michael L Ross, The Oil Curse: How Petroleum Wealth Shapes the Development of Nations (Princeton University Press 2012).

that statutory notice requirements were ignored and that consultation, where it occurred at all, followed rather than preceded the decisions it was nominally meant to inform.[9] Ambreena Manji's study of land dispossession across post-2010 Kenya situates this specific sequence within a considerably wider pattern, arguing that the transformative land justice promises of the 2010 Constitution have repeatedly been outpaced, in practice, by an alliance of political and commercial interests capable of treating compulsory acquisition as a formality to be completed rather than a constitutional safeguard to be honoured, particularly wherever the land in question is wanted for an infrastructure project the national government has already committed itself to politically.[10]

That pattern produced litigation, and the litigation produced a judgment worth recounting in some detail, because it is the single most directly relevant precedent Kenya's courts have handed down for exactly the scenario now unfolding. In ***Mohamed Ali Baadi and Others v Attorney General and 11 Others***, a four-judge bench of the High Court, sitting at Malindi, found in April 2018 that the state had failed to conduct adequate environmental impact assessment and had denied Lamu's fishing communities meaningful public participation before commencing Lamu Port's construction, in breach of Articles 42 and 69 of the Constitution and the cultural rights of communities whose livelihoods depended on the fishing grounds the port's dredging displaced.[11] The court awarded approximately KES 1.7 billion in compensation to roughly five thousand fisherfolk, and, in a detail this article considers easy to overlook amid the headline figure, the judgment also records that the original LAPSSET masterplan the case examined had itself contemplated an oil refinery, at Bargoni, as one of the corridor's planned components.[12] Lamu's courts, in other words, have already litigated the legal consequences of a refinery once, in outline, eight years before Dangote's engineers arrived to conduct soil tests.

A second precedent supplies the interpretive standard against which Baadi, and now Dangote, must be read. In ***Mui Coal Basin Local Community and 15 Others v Permanent Secretary, Ministry of Energy***, the High Court articulated what this article will call, for analytical convenience rather than as a claim about the court's own terminology, a standard of anticipatory participation: public involvement in a mega-project must be early, qualitative and genuinely capable of altering the outcome, rather than a public-relations exercise conducted once the substantive decisions have already been taken.[13] It is worth recording plainly that the Mui petitioners lost that case on its facts; the court dismissed their petition even as it articulated the standard against which every subsequent project, this one included, is now measured. The standard survived its own case's defeat because later courts, Baadi's among them, have applied it with more consequence than the court that coined it did. The Dangote project is not Lamu's first brush with the resource curse's characteristic promise. It may be, depending on what happens between now and

[9]'The Curse of Compulsory Land Acquisition in Lamu, Kenya' (Natural Justice, 10 December 2020) <https://naturaljustice.org/the-curse-of-compulsory-land-acquisition-in-lamu-kenya/> accessed 10 August 2026.
[10]Ambreena Manji, The Struggle for Land and Justice in Kenya (James Currey 2020).
[11]Mohamed Ali Baadi and Others v Attorney General and 11 Others [2018] eKLR (High Court at Malindi, Petition No. 22 of 2012, 30 April 2018).
[12]Ibid 11 above.

October's groundbreaking, only the most expensive test yet of whether that standard has finally acquired teeth.

IV. The architecture of consent: Article 69, the Community Land Act, and the statutory floor beneath Lamu's mobilisation

What distinguishes Lamu's present situation from the one Baadi adjudicated is not the absence of applicable law; it is the considerable expansion of that law in the intervening years, expansion that has yet to be tested against a project of this scale. Article 69(1) of the Constitution obliges the State to "ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits," and separately to "utilise the environment and natural resources for the benefit of the people of Kenya."[14] The Community Land Act, 2016 goes considerably further than the general environmental language of Article 69, and the provision that matters most for Lamu is not, as it is sometimes loosely characterised, a general right to be consulted, but a specific and enforceable precondition on any investment agreement. Section 36 of the Act requires that an agreement between an investor and a community be preceded by "a free, open and consultative process," accompanied by an environmental, social and cultural impact assessment, and provides that no such agreement is valid "unless it is approved by a resolution made by two thirds of the adult members of the community present at a meeting convened for that purpose."[15] A two-thirds supermajority requirement, enforced correctly, is not a consultation exercise a company can complete in an afternoon. It is closer to a community veto, and it places Kenyan domestic law, on this narrow point, ahead of the international instruments most often invoked in this field: Kenya has not ratified the International Labour Organization's Indigenous and Tribal Peoples Convention, and the free, prior and informed consent standard the UN Declaration on the Rights of Indigenous Peoples articulates in its Article 32 remains, formally, soft law rather than a binding treaty obligation, yet Section 36 already domesticates a materially similar consent requirement as ordinary, judicially enforceable Kenyan statute.[16]

Manji's continent-wide study of land law reform supplies a useful note of caution about instruments of exactly this kind, however: across the African jurisdictions her research surveys, the recurring failure has not been the absence of protective legislation but the tendency of legislators, consultants and courts to translate what were meant as substantive community protections into procedural checklists, satisfied by holding a meeting rather than by the meeting actually being capable of producing a different outcome.[17] Section 36 is only as strong as the willingness of Kenyan regulators to resist that same translation. The Petroleum Act, 2019 supplies the third pillar of this architecture. Section 9 requires that petroleum operations be conducted for the benefit of the people of Kenya, and sections 50 to 52 establish local

[13]Mui Coal Basin Local Community and 15 Others v Permanent Secretary, Ministry of Energy and 17 Others [2015] eKLR (Consolidated Petitions 305 of 2012, 34 of 2013 and 12 of 2014).
[14]Constitution of Kenya 2010, art 69(1)(a), (h).
[15]Community Land Act 2016 (No. 27 of 2016), s 36.
[16]International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989); United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (13 September 2007), art 32.
[17]Ambreena Manji, The Politics of Land Reform in Africa: From Communal Tenure to Free Markets (Zed Books 2006).

content obligations requiring operators to prioritise Kenyan goods, services and labour and to submit local content plans for regulatory approval, obligations that give the local employment demands Lamu's leaders have already begun to articulate a statutory foundation rather than leaving them as a matter of corporate discretion or political goodwill.[18]

V. Constitutionalism in real time: Mobilisation, ultimatum, and a dispute not yet adjudicated

None of this is abstract doctrine awaiting its first test. Within a day of Dangote Industries confirming Lamu as the chosen site, constitutional lawyer Levi Munyeri issued a public ultimatum, giving the government one week to conduct genuine public participation with Lamu's residents before he would petition the High Court to halt construction, framing his objection explicitly in the vocabulary this article has traced: the Constitution, he argued, requires public participation that explains the project's significance and benefits, not a mere referendum on support or opposition after the fact.[19] Lamu's Council of Elders, through chairperson Shee Mbwana, announced grassroots sensitisation forums intended to mobilise residents against the project pending resolution of their concerns, citing the same history of mega-projects violating community rights this article has recounted; the Council of Imams and Preachers of Kenya's Lamu branch called for the refinery's benefits to extend to county-wide infrastructure, health and education spending rather than remaining confined to the refinery site itself, and community representatives have separately proposed a Community Development Fund to channel proceeds toward education, healthcare and youth entrepreneurship.[20] Greenpeace Africa, for its part, has signalled it is considering formal legal action, arguing that the government made political and financial commitments to the project before completing the Environmental and Social Impact Assessment and before affording communities adequate opportunity to participate, an argument that, if it reaches a courtroom, would place Article 69's environmental obligations and Section 36's consent requirements squarely before a judge for the first time in this specific dispute.[21] Even the project's political trajectory has been contested: Siaya Governor James Orengo publicly accused the national government of entertaining a shift of the investment to Tanzania at the Coast region's expense, before Dangote's confirmation of Lamu settled that particular argument, if none of the others.[22]

The significance of this catalogue is not that Lamu's residents and allies are unusually litigious. It is that every legal argument this article has traced through statute and precedent is already being made, by named people, in public, against a project whose groundbreaking is months rather than years away. The question this article poses is not hypothetical. It is presently being adjudicated in press statements and ultimatums, and will shortly, on the available evidence, be adjudicated in a courtroom.

[18]Petroleum Act 2019 (No. 2 of 2019), ss 9, 50-52.

[19]'Lawyer Threatens Court Action to Stop Ksh2.59 Trillion Dangote Refinery in Lamu' (Kenyans.co.ke, 9 July 2026) <https://www.kenyans.co.ke/news/125065-lawyer-threatens-court-action-stop-ksh259-trillion-dangote-refinery-lamu> accessed 10 August 2026.

[20]Daily Nation (n 2); 'Lamu Port grand plan: The battle over Dangote's Sh2.2trn refinery' Daily Nation (Nairobi, 28 July 2026) <https://nation.africa/kenya/business/lamu-port-grand-plan-the-battle-over-dangote-s-sh2-2trn-refinery-5536126> accessed 10 August 2026.

[21]African Sustainability Matters (n 5); 'Greenpeace threatens legal action over Dangote Lamu refinery' (Semafor, 31 July 2026) <https://www.semafor.com/article/07/31/2026/greenpeace-threatens-legal-action-over-dangote-lamu-project-plan> accessed 10 August 2026.

[22]Kenyans.co.ke (n 19).

VI. Comparative political economy I: The Nigerian precedent and compensation without power

Dangote's own public framing of the Lamu refinery, that it is modelled on the company's flagship facility at Lekki, invites a comparison the company may not have intended in quite this sense.[23] Nigeria's decades-long experience of oil extraction in the Niger Delta produced, across successive failed institutional experiments, a legislative architecture that arrived, in 2021, at a considered answer to the question Lamu is now confronting for itself. The scale of what preceded that architecture is documented at length in Ike Okonta and Oronto Douglas's account of Royal Dutch Shell's decades of operations in Ogoniland, which traces how gas flaring, unlined pipelines and pollution of farmland and fishing waters proceeded for decades with the tacit protection of a succession of Nigerian governments, protection that culminated, in 1995, in the military execution of writer and MOSOP leader Ken Saro-Wiwa after he organised Ogoni resistance to exactly that pattern of extraction without consent.[24] The Petroleum Industry Act, 2021 requires oil and gas operators to establish Host Communities Development Trusts, funded by an annual contribution equal to three per cent of the operator's operating expenditure in the relevant area, specifically to finance infrastructure and development projects for the communities hosting extractive operations.[25] Community advocates had pressed for a considerably higher figure, ten per cent, and the compromise the National Assembly settled on has attracted a specific and, this article suggests, transferable criticism: the trusts channel money to host communities without granting those communities any comparable voice in the underlying decisions that affect them. Host communities have no recognised standing to contest an operator's decision to divest from a licence area, and the appointment of trustees to the boards administering these funds has proved vulnerable to interference by state governments and by the operators themselves, who retain practical influence over a structure nominally designed to be independent of them.[26] The Niger Delta, in other words, did not arrive at a "resource curse" through the absence of law. It arrived there through five decades of law that kept being rewritten to compensate communities financially while declining, at every rewriting, to grant them power.

Measured against that outcome, Kenya's Community Land Act occupies genuinely different ground, at least on paper. A trust fund a community cannot veto is a mechanism for managing grievance after the fact. A two-thirds assembly vote a community can withhold is a mechanism for preventing the grievance from arising in the first place, and it is, on paper, the stronger of the two instruments Nigeria and Kenya have respectively produced. Whether that distinction survives contact with an eager investor, an accommodating regulator and a government that has already committed political and financial capital to the project's success is precisely what remains to be tested.

[23] Mjengo Hub, 'Dangote to Start Construction of Sh2.2 Trillion Lamu Oil Refinery Before End of 2026' (5 August 2026) <https://mjengohub.co.ke/articles/companies/dangote-to-start-construction-of-sh22-trillion-lamu-oil-refinery-before-end-of-2026> accessed 10 August 2026.
[24] Ike Okonta and Oronto Douglas, Where Vultures Feast: Shell, Human Rights, and Oil in the Niger Delta (Verso 2003).
[25] Petroleum Industry Act 2021 (Nigeria), ch 3; 'Nigeria's Petroleum Industry Act and the Host Communities Development Trust' (Aluko & Oyebode) <https://www.aluko-oyebode.com/insights/nigerias-petroleum-industry-act-host-communities-development-trust/> accessed 10 August 2026.
[26] ibid.

VII. Comparative political economy II: Ghana's tiered ownership model and the limits of legal transplantation

Nigeria is not the only, nor the most instructive, African comparator available. Ghana's Petroleum (Local Content and Local Participation) Regulations, 2013 took a structurally different approach to the same underlying problem, one built around tiered ownership and staffing requirements rather than after-the-fact compensation. The Regulations require indigenous Ghanaian companies to hold a minimum equity stake, currently five per cent, in petroleum agreements, and define an "Indigenous Ghanaian Company" by reference to specific thresholds: at least fifty-one per cent Ghanaian equity ownership, at least eighty per cent of executive and senior management positions held by Ghanaian citizens, and one hundred per cent of non-managerial positions reserved for Ghanaians.[27] Operators must submit a local content plan for regulatory approval before commencing petroleum activity, and the Ghanaian Parliament reinforced the framework in 2016 through the Petroleum (Exploration and Production) Act, which requires that Ghanaian firms be given supply-chain preference across materials, equipment and services.[28] The Ghanaian model has attracted its own critics, particularly over the practical difficulty of verifying compliance with ownership and staffing thresholds and the risk that "indigenous" status becomes a paper qualification rather than a substantive one, but it supplies a template considerably closer to genuine economic participation than a compensation trust ever can, because equity and management control, unlike a development fund disbursement, do not depend on an operator's continued goodwill to keep flowing.[29]

Kenya's Petroleum Act local content provisions sit closer, in their present statutory form, to Ghana's staffing and procurement requirements than to Nigeria's trust model, which is a genuine advantage this article does not want to understate. The advantage is entirely contingent on enforcement, and it is here that the caution against legal transplantation this section's title signals becomes concrete: a statute copied from a jurisdiction with a functioning audit culture does not automatically import that audit culture along with it. A local content plan that exists on a regulator's shelf, unaudited and unpublished, protects no one; a local content plan a community and a credible independent monitor can actually inspect protects a great deal. Nothing in the statute currently before Lamu's residents guarantees which of those two documents the Dangote plan will turn out to be.

VIII. Sovereignty's outer limit: Investor-state arbitration and the Ecuadorian precedent

It would be a significant omission for an article concerned with resource extraction and community remedy to confine its comparative lens to Africa alone, because the starkest illustration available anywhere of how thoroughly a legal victory can be hollowed out did not happen on this continent. Between 1964 and 1992, Texaco, later acquired by Chevron, extracted an estimated $30 billion in oil from Ecuador's Amazon region while dumping millions

[27] Petroleum (Local Content and Local Participation) Regulations 2013 (Ghana, LI 2204), regs 4(2), 7, 49.
[28] Petroleum (Exploration and Production) Act 2016 (Ghana, Act 919), s 61(1).
[29] Ovadia, JS, 'Local content policies and petro-development in Sub-Saharan Africa: a comparative analysis' (2016) 49 Resources Policy 20.

of gallons of toxic waste and drilling byproducts into the rainforest its operations occupied, harm that indigenous nations including the Secoya and thousands of campesino families spent more than two decades litigating, first in the United States, then, at the company's own insistence, in Ecuador's courts.[30] In 2011, an Ecuadorian court entered judgment against Chevron for approximately $9.5 billion, a judgment Ecuador's Constitutional Court subsequently affirmed as fully enforceable.[31] The affected communities have, as of the time of writing, collected none of it. Chevron initiated investor-state arbitration against Ecuador itself under a bilateral investment treaty, and in 2018 a tribunal sitting at The Hague declared the domestic judgment "procured through fraud" and ordered Ecuador's own courts to prevent its enforcement, a private arbitral panel effectively nullifying a verdict the affected country's highest court had already upheld.[32] The saga's most recent chapter is the most damning: in December 2025, a further arbitration ruling ordered the Ecuadorian state, not Chevron, to pay the company approximately $220 million, meaning the communities that suffered what has been called an ecological catastrophe on the scale of an "Amazonian Chernobyl" have received nothing, while their own government now owes money to the company found responsible for the harm.[33]

The lesson this article draws from Ecuador is not that Kenyan courts should hesitate to rule against Dangote should the evidence warrant it. It is that a domestic constitutional victory, however well-reasoned, is not necessarily the end of the story if the underlying investment is structured to permit an exit into international arbitration, a forum in which the constitutional guarantees this article has spent several sections establishing carry no formal weight at all. Sovereignty, on this account, has an outer limit that domestic constitutionalism alone cannot reach: a state's own courts can enforce a judgment right up to the point where an entirely separate, extraterritorial legal order intervenes to prevent it. Whether Dangote's financing structure, spanning internally generated capital, international bond markets and a planned cross-border initial public offering, creates comparable exposure is a question this article cannot answer from the public record currently available, and it is precisely the kind of question a rigorous local content agreement and a transparent environmental approval process, conducted before rather than after financial close, would be far better placed to foreclose than any subsequent litigation could be.

IX. Kenya's converse precedent: Regulatory compliance as insulation in Cortec v Republic of Kenya

Kenya, fortunately, does not have to look only to Ecuador's example to understand how investor-state arbitration might treat a dispute of this kind, because Kenya has its own precedent, and it points in a considerably more reassuring direction, provided one condition is met. In Cortec Mining Kenya Limited and Others v Republic of Kenya, an investment tribunal constituted under the UK-Kenya bilateral

[30]Amazon Watch, 'Chevron vs Ecuador: International Arbitration and Corporate Impunity' (27 March 2019) <https://amazonwatch.org/news/2019/0327-chevron-vs-ecuador-international-arbitration-and-corporate-impunity> accessed 10 August 2026.

[31]Inside Climate News, 'Their Lives Were Ruined by Oil Pollution, and a Court Awarded Them $9.5 Billion. But Ecuadorians Have Yet to See a Penny From Chevron' (18 December 2022) <https://insideclimatenews.org/news/18122022/steven-donziger-chevron-ecuador-oil-pollution/> accessed 10 August 2026.

[32]ibid; Amazon Watch (n 30).

[33]Amazon Watch, 'Ecuador's Government Celebrates Its Defeat in Chevron Arbitration While the Company Applauds a $220 Million Award' (10 December 2025) <https://amazonwatch.org/news/2025/1209-ecuadors-government-celebrates-its-defeat-in-chevron-arbitration> accessed 10 August 2026.

investment treaty held, in October 2018, that the claimants did not possess a protected investment under the treaty at all, because they had failed to comply with Kenyan law, specifically the environmental impact assessment requirements, in obtaining the mining licence underlying their claim, a finding consistent with an earlier ruling of Kenya's own Court of Appeal.[34] The tribunal's reasoning supplies the condition this article has been building toward: an investor's international law protections are not unconditional, and a state that insists, rigorously and from the outset, on compliance with its own environmental and constitutional requirements strengthens rather than weakens its position should a dispute ever reach international arbitration. Cortec is, in this sense, the inverse of Ecuador. Ecuador's vulnerability arose in part from decades of regulatory permissiveness the state itself had once extended to Texaco; Kenya's insulation in Cortec arose precisely because its courts and regulators declined to extend the same permissiveness to a later investor. Greenpeace's complaint that Dangote's environmental approvals may have been sequenced after political commitments were already made is not merely an environmental grievance on this reading. It is a live question about which precedent, Cortec's or Ecuador's, Kenya is currently on course to resemble.

X. Critical synthesis: Empowerment as a condition of enforcement, not a further discovery of rights

Stripped of its considerable financial glamour, the question this article's title poses resolves into something more precise and more answerable than "empowerment" or "marginalisation" as free-floating aspirations. It resolves into whether three specific, existing legal mechanisms are permitted to operate as designed before October's groundbreaking rather than being treated as formalities to be satisfied after the fact. The first is Section 36 of the Community Land Act: whether Lamu's community assembly is asked for its two-thirds approval on the basis of genuine information, in the manner the standard of anticipatory participation requires, or presented with a decision already made elsewhere and invited merely to ratify it, in the manner the Mui petitioners themselves experienced and lost on. The second is the Petroleum Act's local content machinery: whether the plan Dangote eventually submits resembles Ghana's verifiable ownership and staffing thresholds or Nigeria's compensation-without-power trust model, and whether Kenya's regulators publish and audit that plan rather than merely receiving it. The third is the sequencing of environmental approval itself: whether the Environmental and Social Impact Assessment Greenpeace says has been overtaken by political commitment is completed, contested where necessary, and permitted to bind the project's design, or whether it becomes, as it did for Lamu Port in the sequence Baadi later condemned, a document produced to justify a decision rather than to inform one, and, per Cortec, the very document on which Kenya's insulation from adverse international arbitration will eventually depend.

None of these three questions requires Kenya to invent new law, resist a beneficial investment, or choose romantically between development and dignity, a framing this article considers false in any case.

[34] Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya, ICSID Case No. ARB/15/29, Award (22 October 2018); 'Investment Arbitration in Africa' (Global Arbitration Review, 2021) <https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2021/article/investment-arbitration-in-africa> accessed 10 August 2026.

The Dangote Lamu Refinery is a proposed US$17 billion (roughly KSh2.2–2.6 trillion) oil refinery planned for Lamu, Kenya, by Dangote Industries. But the project is also controversial. Environmental organisations have raised concerns about potential impacts on Lamu's mangroves, coral reefs, seagrass beds, fisheries and coastal communities, as well as oil-spill and air-pollution risks.

They require the state to enforce, before construction rather than through a decade of subsequent litigation, the considerable body of law it has already written for exactly this circumstance. Lamu's fishermen won their case in 2018. They are still, on the evidence this article has gathered, waiting to see whether anyone in government read the judgment.

XI. Conclusion

Lamu Old Town's coral-stone walls have outlasted the Portuguese, the Omani Sultanate, and a century of British administration, and they will, in all likelihood, outlast whatever is decided about the refinery now approaching its shoreline. What will not automatically outlast that decision is the livelihood of the fishing and farming communities the last mega-project on this coast already displaced once, compensated for a decade late, and, on the present record, is at genuine risk of displacing again before the first lesson has been fully absorbed. Kenya possesses, in Article 69, in Section 36 of the Community Land Act, and in the Petroleum Act's local content provisions, a legal architecture considerably more protective, on paper, than the one that produced five decades of grievance in the Niger Delta before Nigeria's Parliament caught up with the damage already done. Whether that architecture proves to be more than paper will be decided in the months between this article's publication and October's groundbreaking, by regulators who have already been told, in a courtroom in 2018 and in a lawyer's public ultimatum in 2026, exactly what the law requires of them. The resource curse, wherever it has taken hold, was never a curse imposed by geology. It was a choice, repeated often enough to look inevitable, to let capital arrive before consent did. Lamu's residents have already shown they know the difference. What remains uncertain is whether anyone with the power to enforce it does too.

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The threshold of incitement hate speech law in Kenya and the question of whether it can work

By Timothy Ngome

I. Introduction

A man in a red shirt climbs onto the flatbed truck. He is not a Member of Parliament. He is not yet anything. He wants to be something in 2027, and this is how one becomes something.

He speaks for eleven minutes. Ten of those minutes are unremarkable, the usual liturgy of roads, bursaries, county tenders and the perfidy of the incumbent. In the eleventh minute he says something else. He says it in Kiswahili, then repeats it in the vernacular for emphasis, and the second version is not a translation so much as a sharpening. He speaks of people who came here, who were given land by a government that did not consult the owners of that land, who now hold the shops along this very road, and who will be counted in the register in 2027 as though they belonged. He does not say what should be done about them. He says that a time is coming when the question will be settled. He says the word "settled" twice. The crowd, or part of it, makes a sound that is not quite a cheer.

Someone films the eleventh minute on a phone. The clip has been shared in

Hate speech law regulates public statements that promote hatred, discrimination or violence against individuals or groups because of characteristics such as ethnicity, race, religion, nationality, sex or disability.

perhaps four hundred WhatsApp groups. Soon a complaint has been lodged with the National Cohesion and Integration Commission. By the following month, if precedent is any guide, one of three things will have happened. The Commission will have summoned the man, he will have apologised in front of cameras, and the matter will have ended. Or the file will have gone to the Office of the Director of Public Prosecutions and remained there. Or, least likely of all, he will have been charged under section 13 of the National Cohesion and Integration Act, and in eighteen months a magistrate will acquit him because the prosecution could not prove that he intended to stir up ethnic hatred, and because the Kiswahili word he used has four meanings, and because the phone that recorded him was never produced with a certificate under section 106B of the Evidence Act.

There is a fourth possibility, and events of the past week have made it the most instructive of all. If the man in the red shirt is aligned to the wrong faction, and if his eleventh minute can be construed as a threat to persons who support the government of the day, he may find that none of this careful machinery is engaged at all. He may simply be arrested.

That is the Kenyan hate speech problem, compressed into a single afternoon. It is not, contrary to a great deal of comfortable commentary, a problem of missing law. Kenya has more law on this subject than most jurisdictions in the Commonwealth. It is a problem of threshold: of where, precisely, the criminal law draws its line between speech that is ugly and speech that is culpable, and of whether the line as currently drawn is capable of being applied by a magistrate at Webuye or Kapsabet on a Tuesday morning with a part-heard cause list and a prosecutor who received the file that week. It is also, and increasingly, a problem of who is asking.

This article asks whether the framework can work. The answer offered here is a qualified yes, but only on conditions that Kenya has so far declined to meet, and only if the state is prepared to abandon two habits it acquired long ago: the habit of announcing powers it does not possess, and the habit of enforcing the ones it does possess in one direction only.

II. The problem

Two distinct wrongs travel under a single name in Kenyan public discourse, and the conflation is the origin of much of the difficulty.

The first is incitement. Incitement is an inchoate wrong. It is complete at the moment of utterance, whether or not anybody acts on it, and its gravamen is the creation of a risk that others will do violence or unlawful damage. It is a species of the same family as attempt, conspiracy and solicitation, and like them it punishes conduct that has not yet produced its intended result. The law of incitement is therefore always doing something delicate: it is punishing a person for what a third party might do, on the basis of a causal chain that has not yet closed.

The second is hate speech in the narrower and more modern sense, which is speech that degrades, vilifies or expresses contempt for persons by reason of a protected characteristic. Its wrong is not primarily the creation of a risk of violence. Its wrong is the assault on the dignity and equal standing of the persons vilified, and the corrosion of the conditions under which they can participate as equals in public life. It is closer in structure to discrimination than to attempted murder.

There is a third wrong, less often named, which the events of this and last month have pushed to the front of the analysis. It is electoral coercion: the conditional threat of adverse consequence directed at a voter on account of how that voter intends to vote. Its target is not a rival community. Its target is the speaker's own community, and its purpose is not to stir up hatred against outsiders but to enforce discipline among insiders. This is, on any honest reading of Kenyan campaign rhetoric, the dominant pathology, and it is the one for which the hate speech statute is least suited.

These wrongs justify different legal responses and different thresholds. Incitement, because it is inchoate and because it is punished on a probabilistic causal theory, demands a high threshold, and in most mature systems it demands proof of specific intent and of a real and proximate likelihood of harm. Vilification, because its harm is complete in the utterance and does not depend on a contingent future act, can sustain a lower threshold, but for that very reason should ordinarily attract civil or administrative rather than criminal sanction. Electoral coercion is a distinct statutory wrong with its own established elements, and Kenya has legislated for it competently and then almost entirely forgotten that it did so.

Kenyan law does not make these distinctions cleanly in practice. Article 33(2) of the Constitution of Kenya, 2010 removes from the protection of the right to freedom of expression four categories: propaganda for war; incitement to violence; hate speech; and advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm, or that is based on any ground of discrimination specified or contemplated in Article 27(4).[1] The drafters clearly had in mind more than one wrong. What they did not do, and what Parliament has not since done, is attach a distinct threshold and a distinct sanction to each.

The consequence is a body of law in which a magistrate is invited to apply a single statutory formula to a genocidal broadcast and to an intemperate remark about a rival's community at a funeral, and in which the sanction available in each case is the same fine and the same term of imprisonment.

III. The framework

It is worth setting out what actually exists, because the frequent complaint that Kenya lacks a legal framework is simply false.

Article 33(1) guarantees freedom of expression, including the freedom to seek, receive or impart information or ideas and the freedom of artistic creativity. Article 33(2) carves out the four categories described above. Article 33(3) requires every person, in exercising the right, to respect the rights and reputation of others. Article 24 supplies the general limitation clause, permitting limitation only by law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, having regard to the nature of the right, the importance and purpose of the limitation, its nature and extent, the relation between the limitation and its purpose, and whether the purpose could be achieved by less restrictive means.[2] Article 27 prohibits discrimination on a long list of grounds. Article 38 guarantees political rights, including the right to free, fair and regular elections and the right to be a candidate. Article 2(5) and 2(6) bring general rules of international law and ratified treaties into Kenyan law.

An important structural point follows from the interaction of Article 33(2) and Article 24, and it is one that Kenyan courts have not resolved with sufficient clarity. Article 33(2) is not itself a limitation of the right; it is a definition of the right's outer boundary. Speech falling within Article 33(2) is not protected expression at all. But that only shifts the analytical weight onto the question of what counts as hate speech or incitement, because the definition of the excluded categories is now doing the work that a proportionality analysis would otherwise do. A statute that defines hate

[1]Constitution of Kenya 2010, art 33(2).
[2]ibid art 24(1). On the structure of limitation analysis see *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* [2014] eKLR (SC).

speech expansively does not merely limit the right; it shrinks the right by definitional fiat, and it does so without ever having to face an Article 24 justification. This is the single most under-analysed problem in Kenyan free expression jurisprudence.

The National Cohesion and Integration Act, 2008. Section 13 creates the offence of hate speech. It applies to a person who uses threatening, abusive or insulting words or behaviour, or displays written material that is threatening, abusive or insulting, or publishes or distributes such material, or presents or directs a public performance of a play, or distributes, shows or plays a recording of visual images, in each case either with intent to stir up ethnic hatred, or in circumstances where ethnic hatred is likely to be stirred up having regard to all the circumstances. Ethnic hatred is defined as hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins. The penalty is a fine not exceeding one million shillings, or imprisonment for a term not exceeding three years, or both.[3] Section 62 creates the related offence of ethnic or racial contempt, directed at words intended to incite feelings of contempt, hatred, hostility, violence or discrimination against a person or community on the basis of ethnicity or race.

The Penal Code. Section 96 criminalises the uttering, printing or publishing of words, or the doing of any act or thing, indicating or implying that it is desirable to do or omit to do anything calculated to bring death or physical injury to a person or class of persons, or to lead to the damage or destruction of property, or to prejudice the public peace. The penalty is imprisonment for a term not exceeding five years. Section 96 is the general incitement provision and it predates the constitutional order by more than half a century.

The electoral framework. The Election Offences Act, 2016 creates the offence of undue influence at section 10, which reaches a person who directly or indirectly uses or threatens to use force, violence, restraint, or material, physical or spiritual injury, harmful cultural practices, damage or loss, or any fraudulent device, trick or deception, for the purpose of inducing or compelling a person to vote or not to vote for a particular candidate or political party, or of compelling a person to withdraw as a candidate, or of impeding a person's nomination or registration as a voter.[4] Section 16 makes breach of the Electoral Code of Conduct an offence. The Electoral Code of Conduct in the Second Schedule to the Elections Act, 2011 binds political parties, candidates and their agents to refrain from language that incites violence or hatred, and confers enforcement powers on the Independent Electoral and Boundaries Commission. The Political Parties Act, 2011 contains cognate obligations.[5] These are, on the analysis offered below, the most under-used instruments in the entire framework, and section 10 in particular is the most under-used provision in Kenyan electoral law.

The digital layer. The Computer Misuse and Cybercrimes Act, 2018 supplied a set of speech offences applicable to electronic communication, including the publication of false information under sections 22 and 23 and cyber harassment under section 27.

[3]National Cohesion and Integration Act 2008, s 13; see also s 62 (ethnic or racial contempt) and s 13(3) (penalty).
[4]Election Offences Act 2016, s 10(1).
[5]Elections Act 2011, Second Schedule (Electoral Code of Conduct), read with s 110; Election Offences Act 2016, s 16 (breach of the Electoral Code of Conduct); Political Parties Act 2011.

That layer has been substantially reshaped. On 6 March 2026 the Court of Appeal, in *Bloggers Association of Kenya (BAKE) v Attorney General & 6 others*, allowed the appeal in part and declared sections 22 and 23 unconstitutional on the ground that they were so broad as to be likely to catch innocent persons, and that they unjustifiably limited the freedoms guaranteed by Articles 33 and 34.[6] The remainder of the Act, including the investigative and interception powers, was left standing, and the resulting mixed outcome has generated cross-appeals to the Supreme Court by the bloggers, by civil society and by the Director of Public Prosecutions.[7] Separately, the Computer Misuse and Cybercrimes (Amendment) Act, 2025 expanded state powers over digital communication and drew sustained criticism for its potential to criminalise ordinary speech.

The international frame. Article 19(3) of the International Covenant on Civil and Political Rights permits restrictions on expression only where provided by law and necessary for respect of the rights or reputations of others or for the protection of national security, public order, public health or morals. Article 20(2) obliges States to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. General Comment No 34 of the Human Rights Committee makes clear that a prohibition mandated by Article 20(2) must nonetheless satisfy the Article 19(3) test.[8] Both provisions are part of Kenyan law by operation of Article 2(6) of the Constitution.

That is not a thin framework. It is, if anything, an overgrown one. And yet the enforcement record is close to barren.

IV. The culture

The Commission established to administer this framework has been in existence since 2008. Its own accounts describe a steady flow of complaints, investigations and conciliations. In the second quarter of 2024 alone it reported receiving sixty seven cases, of which forty three were under investigation, thirteen concluded, thirteen conciliated, and two before the courts.[9] In February 2026 the Inspector General told the Senate that the National Police Service and the Commission had jointly investigated twelve cases of hate speech, incitement, cyber harassment and dissemination of inflammatory content over the preceding year, most of which remained under investigation.[10]

Two cases before the courts out of sixty seven complaints in a quarter. Twelve joint investigations in a year, in a country of fifty six million people entering an election cycle. These are not the numbers of a functioning

[6] *Bloggers Association of Kenya (BAKE) v Attorney General & 6 others* (Civil Appeal 197 of 2020) [2026] KECA 430 (KLR) (6 March 2026), setting aside in part *Bloggers Association of Kenya v Attorney General & others* [2020] eKLR (Makau J). See also ICJ Kenya, 'Court of Appeal Declares Sections of Cybercrimes Act Unconstitutional' (ICJ Kenya, 9 March 2026) https://icj-kenya.org/news/court-of-appeal-declares-sections-of-cybercrimes-act-unconstitutional/ accessed 3 August 2026.
[7] 'Bloggers, LSK and DPP Escalate Cybercrime Law Battle to Supreme Court' (*Daily Nation*, 5 April 2026) https://nation.africa/kenya/news/bloggers-lsk-and-dpp-escalate-cybercrime-law-battle-to-supreme-court--5413496 accessed 3 August 2026; 'LSK Moves to Supreme Court Over Cybercrime Law Surveillance Provisions' (*Citizen Digital*, 14 May 2026) https://citizen.digital/article/lsk-moves-to-supreme-court-over-cybercrime-law-surveillance-provisions-n382613 accessed 3 August 2026.
[8] UN Human Rights Committee, 'General Comment No 34: Article 19: Freedoms of Opinion and Expression' (12 September 2011) UN Doc CCPR/C/GC/34, paras 50 to 52.
[9] 'NCIC Probes 43 Cases of Hate Speech with 2 Already in Court' (*The Eastleigh Voice*, 12 July 2024) https://eastleighvoice.co.ke/national/58045/ncic-probes-43-cases-of-hate-speech-with-2-already-in-court accessed 3 August 2026.
[10] 'Kanja Reports 12 Joint Hate Speech Investigations with NCIC in a Year' (*Capital FM*, 25 February 2026) https://www.capitalfm.co.ke/news/2026/02/kenya-police-probe-hate-speech-cases-2027-elections/ accessed 3 August 2026, reporting the evidence of the Inspector General before the Senate Standing Committee on National Cohesion, Equal Opportunity and Regional Integration.

enforcement regime. They are the numbers of a regime that has effectively abandoned the criminal law and retained only the summons and the press statement.

The pattern is not new and it is not disputed by the Commission's defenders. The record of high-profile summonses generating headlines while producing few convictions capable of altering political behaviour has followed the institution for the better part of two decades.[11] The most cited early example remains the withdrawal of hate speech charges against a serving Cabinet Minister in 2012 following a public apology, a disposal that established, more firmly than any judgment could have, that the sanction for ethnic incitement by a person of standing is a press conference.[12] The Commission's own constitutional position was tested in the same period, when the Minister challenged the investigation and prosecution as a violation of his freedom of expression, and the Attorney General defended sections 13 and 62 as complementary to Articles 24 and 33.[13]

The pattern recurred within the last fortnight. On 28 July 2026, in a joint statement with the Inter-Religious Council of Kenya, the Commission announced investigations into a former Deputy President, two serving Cabinet Secretaries, a county Governor, a Deputy Governor, a Member of Parliament and others, over utterances attributed to them.[14] The petition against the former Deputy President was framed under Article 27, on ethnic discrimination, and Article 33, and alleged the association of an entire community with criminality and organised violence.[15] The Commission's chairperson, sworn in only in May 2026, made the entirely defensible observation that the body follows due process and cannot open investigations on the strength of circulating video clips alone.[16] That statement is correct as a matter of law and is also, read in the context of eighteen years of non-prosecution, an admission.

Meanwhile the incitement provisions have been busy in a different direction. In June 2025 three human rights defenders were arrested and subsequently charged with incitement and related offences arising from the protests of 25 June, on evidence that a coalition of twenty two policing accountability organisations described as non-existent.[17] A software developer was arraigned for building a web tool that allowed citizens to email Parliament about the Finance Bill.[18] A university student charged over an AI-generated

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[11] Juliet Omelo and Okumu Modachi, 'NCIC Put in a Spot for Lacking Bite in Fight Against Hate Speech' (*The Standard*, 29 July 2026) https://www.standardmedia.co.ke/national/article/2001554042/ncic-put-in-a-spot-for-lacking-bite-in-fight-against-hate-speech accessed 3 August 2026; National Cohesion and Integration Commission, Kenya's National Action Plan Against Hate Speech (NCIC) https://cohesion.go.ke/images/docs/downloads/Kenyas_National_Action_Plan_Against_Hate_Speech.pdf accessed 3 August 2026.

[12] US Department of State, *Country Reports on Human Rights Practices for 2012: Kenya* (2013); 'Analysis: Taming Hate Speech in Kenya' (*The New Humanitarian*, 24 August 2012) https://www.thenewhumanitarian.org/report/96168/analysis-taming-hate-speech-kenya accessed 3 August 2026.

[13] *Chirau Ali Mwakwere v Robert M Mabera & 4 others* (Petition 6 of 2012) [2012] eKLR.

[14] 'NCIC Probes Gachagua, Two CSs, Seven Others Over Hate Speech' (*Citizen Digital*, 28 July 2026) https://citizen.digital/article/ncic-probes-gachagua-two-css-seven-others-over-hate-speech-n387257 accessed 3 August 2026.

[15] Faith Mwangi, 'NCIC Opens Hate Speech Probe Against Gachagua, Duale, Ruku and Other Leaders' (*The Kenya Times*, 28 July 2026) https://thekenyatimes.com/latest-kenya-times-news/ncic-rigathi-duale-ruku/ accessed 3 August 2026.

[16] 'NCIC Opens Probe Into Gachagua, CSs Ruku and Duale, Three MPs' (*Kenyans.co.ke*, 28 July 2026) https://www.kenyans.co.ke/news/125649-ncic-opens-probe-gachagua-css-ruku-and-duale-three-mps accessed 3 August 2026. On the swearing in of the Chairperson and seven Commissioners before the Chief Justice on 20 May 2026 see NCIC, 'Latest News' https://cohesion.go.ke/index.php/about-us/22-latest-news accessed 3 August 2026.

[17] CIVICUS Monitor, 'Kenya's Repression Deepens: 65 More Killed in Protests, Blogger Tortured and Killed' (26 August 2025) https://monitor.civicus.org/explore/kenyas-repression-deepens-65-more-killed-in-protests-blogger-tortured-killed/ accessed 3 August 2026.

[18] CIVICUS Monitor, *State-Sanctioned Brutality in Kenya's Peaceful Youth-Led Uprising* (Research Brief, June 2025) https://civicusmonitor.contentfiles.net/media/documents/Kenya.ResearchBrief.June2025.pdf accessed 3 August 2026.

image was acquitted only in early 2026, having spent two years under charge.[19] A creator in Samburu, charged in July 2025 under section 23 of the Cybercrimes Act, walked free in June 2026 not because he was innocent of the facts but because the section under which he was charged had ceased to exist.[20]

This is the phenomenon that the Rabat Plan of Action identified with unusual bluntness: the coexistence, in the same jurisdiction, of genuine incitement that is never prosecuted and peaceful criticism that is prosecuted vigorously.[21] Kenya is a textbook instance. The threshold, in practice, is not a legal standard at all. It is a function of the speaker's proximity to power.


Mukurweini MP John Kaguchia

V. Two utterances, one arrest

The proposition just stated is ordinarily difficult to demonstrate, because the comparison requires two utterances of similar character occurring closely enough in time that no intervening change of circumstance can explain the difference in treatment. The first week of August 2026 supplied exactly that comparison, and it did so within a single news cycle.

On Saturday 1 August 2026, at a rally at Kieni in Nyeri County, the Member of Parliament for Mukurwe-ini addressed a Mount Kenya audience in Kikuyu on the subject of the 2027 General Election. He warned his listeners against voting for the incumbent President, and said, in terms that have been widely reported and are not seriously disputed, that those who supported the President would be identified and driven out of their homes.[22] The remark drew immediate criticism from government-aligned figures and from senior members of the Bar. On Monday morning, 3 August, after the Member had spent the night inside the studios of Royal Media Services while police surrounded the premises, officers of the Directorate of Criminal Investigations arrested him and took him first to the regional offices and then to headquarters.[23]

[19]'Court of Appeal Verdict, Computer Misuse and Cybercrimes Act' (*The Kenya Times*, 9 March 2026) https://thekenyatimes.com/opinions/court-of-appeal-on-computer-misuse-and-cybercrimes-act/ accessed 3 August 2026.
[20]'Scrapped Sections of Cybercrime Law Saves Creator Francis Lesilampa from Jail' (*HapaKenya*, 11 June 2026) https://hapakenya.com/2026/06/11/scrapped-sections-of-cybercrime-law-saves-creator-francis-lesilampa-from-jail/ accessed 3 August 2026, reporting the ruling of Sitati SPM at Maralal of 10 June 2026.
[21]'Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence,' annexed to Report of the United Nations High Commissioner for Human Rights, UN Doc A/HRC/22/17/Add.4 (11 January 2013).
[22]'Kenya: Mukurweini MP Kaguchia Arrested After Overnight Standoff at Royal Media' (*allAfrica*, 3 August 2026) https://allafrica.com/stories/202608030253.html accessed 3 August 2026; 'Mukurwe-ini MP Kaguchia Arrested at Royal Media Offices Over Alleged Inciteful Remarks' (*The Eastleigh Voice*, 3 August 2026) https://eastleighvoice.co.ke/news/386193/mukurwe-ini-mp-kaguchia-arrested-at-royal-media-offices-over-alleged-inciteful-remarks accessed 3 August 2026. The remarks were delivered in Kikuyu at Kieni, Nyeri County, on 1 August 2026, and the rendering into English varies between outlets; the paraphrase adopted here is the sense common to them. An authenticated translation of the original should be obtained before the passage is relied upon in any formal proceeding.
[23] 'Mukurwe-ini MP John Kaguchia Arrested Over Rally Remarks' (*Nairobi Law Monthly*, 3 August 2026) https://nairobilawmonthly.com/mukurwe-ini-mp-john-kaguchia-arrested-over-rally-remarks/ accessed 3 August 2026.

By that evening the police had not publicly disclosed the reason for the arrest.[24] The Member's own account was that he had received no summons of any kind, that the first indication of any complaint had come from social media activity by a presidential adviser and by legislators from his own region, and that the matter in any event fell within the mandate of the National Cohesion and Integration Commission, before which he was willing to appear.[25] The Commission, which is the body statutorily charged with the subject, had not by then issued any formal statement on the matter at all.[26]

On the same day, 3 August 2026, Citizen television carried remarks by Odungi Randa, the ninth Ker of the Luo Council of Elders, addressed to the Luo community on the subject of the 2027 presidential contest. He prefaced them by invoking his office, saying that he was giving the community direction in his capacity as the head of the Council, and he then told his listeners that if they did not vote for President Ruto he would curse them.[27] No arrest followed. No summons followed. No investigation was announced. Neither the presidential adviser nor the senior members of the Bar who had criticised the Kieni remarks offered any comment upon these.

The two utterances are not identical, and the differences matter. But they are far closer in structure than the difference in treatment can bear.

Consider first what they share. Each is a conditional threat of adverse consequence, contingent on how the listener votes. Each is addressed to a community identified by ethnicity, at a public gathering or on a mass medium, by a speaker who holds a position of standing and influence within that community. Each is delivered in a pre-election period of acknowledged volatility. On the criteria that international practice treats as decisive, which are the social and political context, the status and influence of the speaker, the content and form of the words, and the extent of dissemination, the two are closely comparable, and on two of those criteria the televised remark is the stronger case for the prosecution. Its dissemination was much wider, since it went out on a national broadcast rather than to a crowd at a rally. And on the status of the speaker, the Ker did not merely happen to hold an office of influence; he expressly invoked it as the source of the direction he was giving, which is as clear an assertion of authority over an audience as the Rabat criteria contemplate.

Consider the differences next. The nature of the threatened injury is not the same. To be driven from one's home in Kenya is not a metaphor. It is the specific and remembered harm of 1992, of 1997 and of 2007, and a

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[24] 'NCIC-Led Alliance Launches Coordinated Crackdown on Hate Speech Ahead of 2027 Polls' (*Capital FM*, 3 August 2026) https://capitalfm.africa/ncic-led-alliance-launches-coordinated-crackdown-on-hate-speech-ahead-of-2027-polls/ accessed 3 August 2026.

[25] 'MP John Kaguchia Arrested by DCI Officers After Spending Night at RMS Offices' (*Citizen Digital*, 3 August 2026) https://citizen.digital/article/mp-john-kaguchia-arrested-by-dci-officers-after-spending-night-in-rms-offices-n387611 accessed 3 August 2026.

[26] 'MP Kaguchia Arrested After Night at RMS Studios Amid Row Over Rally Remarks' (*Switch TV News*, 3 August 2026) https://news.switchtv.ke/2026/08/mp-kaguchia-arrested-after-night-at-rms-studios-amid-row-over-rally-remarks/ accessed 3 August 2026.

[27] Odungi Randa, Ker of the Luo Council of Elders, remarks carried by C7 News on 3 August 2026, video published at https://www.facebook.com/share/v/1UfrwcWadM/ accessed 3 August 2026. As carried by the broadcaster, the speaker stated that he was giving the community direction in his capacity as head of the Luo Council of Elders and that if they did not vote for President Ruto he would curse them. Where the remarks were delivered in Dholuo, the original wording and an authenticated translation should be obtained, and the unedited broadcast secured, before the passage is relied upon in any formal proceeding. On the office and its holder see 'Ker Odungi Randa Coronated as Luo Council of Elders Chairman' (*The Star,* 22 December 2023) https://www.the-star.co.ke/siasa/2023-12-22-ker-odungi-randa-coronated-as-luo-council-of-elders-chairman accessed 3 August 2026.

Kikuyu audience in Nyeri understands the reference exactly. A curse, by contrast, threatens a metaphysical rather than a physical harm, and a magistrate might reasonably regard the two as occupying different places on any scale of gravity. That is a real distinction and it would properly bear on the sentence. It does not begin to explain a difference between arrest within forty eight hours and nothing whatsoever.

Now consider the doctrine, which is where the analysis becomes genuinely uncomfortable for the state.

Neither utterance is hate speech within section 13 of the National Cohesion and Integration Act. Section 13 requires that the words be intended, or be likely, to stir up hatred against a group of persons defined by reference to colour, race, nationality or ethnic or national origins. The Member's remark was addressed by a Kikuyu speaker to a Kikuyu audience about Kikuyu voters. The Ker's remark was addressed by a Luo elder to a Luo audience about Luo voters. Neither seeks to stir up hatred against another ethnic group. Both are intra-ethnic political coercion, which is to say that both fall outside the statute that the entire public conversation assumes to be engaged. This is not a technicality. It is the central defect of section 13 restated in contemporary form: the statute was drafted to address a Kikuyu speaking about Luos, and the pathology of 2026 is a Kikuyu threatening Kikuyus and a Luo elder threatening Luos.

What then fits? For the Member's remark, section 96 of the Penal Code fits well. Words implying that it is desirable to do a thing calculated to bring physical injury to a class of persons, or to prejudice the public peace, is a formulation that captures the utterance almost precisely.

For the Ker's remark, section 10 of the Election Offences Act, 2016 fits with an exactness that is close to uncanny, because the drafters of that section expressly anticipated this very form of coercion. Section 10(1) reaches a person who uses or threatens to use spiritual injury or harmful cultural practices for the purpose of inducing or compelling another person to vote or not to vote for a particular candidate or political party.[28] Take the elements in turn. There is a threat, made in terms and in the first person. Its content is spiritual injury, which is the precise statutory language and which no amount of interpretive ingenuity can distinguish from a curse pronounced by the head of a council of elders. Its purpose is expressly stated and is not a matter of inference at all, since the condition attached to the threat is the listener's vote. And the object of the inducement is not a general political disposition but a particular candidate, named. Section 10(1)(a) speaks of inducing or compelling a person to vote for a particular candidate. The utterance identifies the candidate by name. It is difficult to construct a hypothetical that fits the section more neatly than the words actually spoken, and if the provision has any content at all, this is it.

One qualification should be entered in fairness, and one only. Section 10 is framed around inducing a person to vote or not to vote at an election, which raises a question about how far ahead of a gazetted election period the section operates. That is arguable and a court might accept it, although the section is drafted around the purpose of the threat rather than its timing, and a threat made thirteen months before a poll and directed at that poll would seem to

[28] Election Offences Act 2016, s 10(1)(a) (n 4).

be within it. The qualification that might first occur to a reader, that the Ker is not himself a candidate, is not a qualification at all: section 10 applies to any person, and it is drafted precisely to catch those who coerce voters on another's behalf. A second consideration cuts the other way and belongs to sentence rather than liability, which is that the authority of the office has been contested within the community since 2023 and was for a period the subject of litigation, so that the practical coercive force of a curse pronounced under it is a live question of fact.[29]

These are, in any event, arguable points that nobody has argued, because no investigating authority has raised the question at all. The distinction between the two cases was not drawn by any officer, prosecutor or commissioner on any reasoned basis. There is no ruling, no charge sheet, and no published assessment in which the state explains why section 96 was engaged in one case and section 10 was not in the other. The police had not by the end of the day stated why they had arrested anybody.

What remains, once the doctrinal distinctions are set aside because nobody relied on them, is a single variable. The Member's threat was directed at those who would vote for the President. The Ker's was directed at those who would not. That is the whole of the difference, and every Kenyan watching the news that evening could see it.

Three consequences follow, and they are consequences for law and not merely for politics.

The first is doctrinal contamination. Selective enforcement does not simply produce unfairness in the individual case. It supplies every future defendant with material for an application to stay proceedings as an abuse of process, and it does so on solid constitutional ground. Article 157(11) requires the Director of Public Prosecutions to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.[30] A documented pattern of one-sided enforcement is admissible material on such an application, and Kenyan courts have shown themselves willing to entertain challenges founded on oblique motive. The state is thus systematically weakening the very prosecutions it says it wishes to bring.

The second is procedural. The sequence in this case was inverted. For a speech offence the proper order is complaint, investigation, translation and expert analysis of the words in their linguistic and cultural setting, a reasoned charging decision, and then a summons. Arrest is the last step, and in the case of a Member of Parliament with a fixed abode, a known office and a stated willingness to attend, it is very difficult to see what it accomplishes that a summons would not. An arrest conducted before the reason for it has been articulated is not an investigative step. It is a sanction administered in advance of adjudication, and in a speech case it is itself a form of the chilling harm that the law of expression exists to prevent. Article 49 and Article 50(2)(a) are not suspended because the words spoken were objectionable.

The third is the destruction of the moral premise on which any hate speech law

[29] On the contested legitimacy of the office and the 2023 proceedings in the High Court at Siaya, see 'Court Bars Registration of New Luo Council of Elders Leader Odungi Randa' (*Daily Nation*, 5 July 2023) https://nation.africa/kenya/counties/siaya/court-bars-registration-of-new-luo-council-of-elders-leader-odungi-randa--4294278 accessed 3 August 2026.

[30] Constitution of Kenya 2010, art 157(11). See also arts 49 and 50(2)(a).

depends. That premise is a bargain: citizens accept limits on what they may say, in exchange for protection against being vilified and threatened. The bargain requires that the limits apply to everyone. When they visibly do not, the law ceases to be experienced as a shield and becomes an instrument, and the constituency that ought to defend it becomes, quite rationally, its most articulate opponent. The condemnation of the arrest by legislators across the political divide, including the observation that the answer to speech is more speech rather than unlawful repression, is a sign of that shift.[31]

It should be said plainly, because the argument is otherwise open to misreading, that nothing in this section suggests the Member should be free to say what he said. A threat to drive neighbours from their homes on account of their vote is among the gravest utterances available in Kenyan politics, and it deserves a legal response. The argument is that a state which arrests one speaker within forty eight hours while an analogous utterance passes without remark has not applied a threshold. It has used one.

VI. The multi-agency team and the question of imaginary power

Hours after that arrest, on 3 August 2026, a coalition of state agencies announced a coordinated strategy against hate speech, ethnic incitement and election-related offences ahead of the 2027 General Election. The alliance comprises the National Cohesion and Integration Commission, the Independent Electoral and Boundaries Commission, the Ethics and Anti-Corruption Commission, the Directorate of Criminal Investigations, the National Police Service, the Office of the Director of Public Prosecutions, the Office of the Registrar of Political Parties, the Communications Authority of Kenya and the Political Parties Liaison Committee. The agencies warned of a worrying rise in divisive political rhetoric online and at rallies, pledged to act jointly and decisively and without fear or favour, and stated that parties, candidates, elected leaders and their supporters found culpable of hate speech, intimidation or election-related violence would face sanctions ranging from criminal prosecution to regulatory action under electoral and political party laws.[32]

That announcement has been widely reported, and widely understood, as a threat that those who engage in hate speech will be barred from the 2027 ballot. The question this section addresses is whether that power exists. The answer is that it exists in a highly attenuated form, that it is not available on the timescale in which it is being threatened, and that in the sense that matters to the person being threatened it is very largely imaginary.

First, a multi-agency team has no powers. It is not a body corporate. It is not established by statute. It has no legal personality, it cannot make a decision, and no decision can be challenged

[31] 'Unlawful Repression: Babu Condemns Kaguchia's Arrest, Pledges Legal Defence' (*Tuko*, 3 August 2026) https://www.tuko.co.ke/politics/634980-babu-owino-condemns-mp-kaguchias-arrest-vows-legal-defence/ accessed 3 August 2026; 'Political Intimidation or Law Enforcement? What John Kaguchia's Arrest Means as 2027 Heat Rises' (*People Daily*, 3 August 2026) https://peopledaily.digital/insights/political-intimidation-or-law-enforcement-what-john-kaguchias-arrest-means-as-2027-heat-rises accessed 3 August 2026.

[32] Joint statement of the National Cohesion and Integration Commission, the Independent Electoral and Boundaries Commission, the Ethics and Anti-Corruption Commission, the Directorate of Criminal Investigations, the National Police Service, the Office of the Director of Public Prosecutions, the Office of the Registrar of Political Parties, the Communications Authority of Kenya and the Political Parties Liaison Committee, 3 August 2026, reported in Capital FM (n 24) and in 'Kenya: NCIC-Led Alliance Launches Coordinated Crackdown on Hate Speech Ahead of 2027 Polls' (*allAfrica*, 3 August 2026) https://allafrica.com/stories/202608030816.html accessed 3 August 2026.

against it because there is nothing there to be judicially reviewed. Its powers are the arithmetical sum of the powers of its constituent members, and not a fraction more. If no member of the alliance can disqualify a candidate, then the alliance cannot. This is elementary law, and it matters precisely because the rhetorical force of the announcement depends upon the listener not performing the arithmetic. Kenya has a long history of multi-agency arrangements announced with fanfare, and their record is instructive: they aggregate visibility rather than authority, and they diffuse accountability, because when nothing happens there is no single office that can be asked why.

Second, take the members one by one. The National Cohesion and Integration Commission may investigate, conciliate and recommend. It cannot prosecute and it plainly cannot disqualify. The Directorate of Criminal Investigations and the National Police Service investigate. The Office of the Director of Public Prosecutions charges. The Ethics and Anti-Corruption Commission has no jurisdiction over speech at all, its mandate being ethics and anti-corruption, and its presence in the alliance is decorative unless the unstated theory is a Chapter Six route to disqualification, of which more below. The Office of the Registrar of Political Parties and the Political Parties Liaison Committee regulate parties, not the qualifications of individuals for elective office. The Communications Authority licenses broadcasters and telecommunications operators and may act against a station, not against a candidate. That leaves one member with any candidate-facing power at all, which is the Independent Electoral and Boundaries Commission.

Third, the electoral route is real but narrow. The Electoral Code of Conduct in the Second Schedule to the Elections Act, 2011 binds political parties, candidates, referendum committees and their agents, and the Commission may enforce it through an Enforcement Committee empowered to impose sanctions for breach. Breach of the Code is separately an offence under section 16 of the Election Offences Act, 2016. This is genuine authority and it operates on a civil standard and on a shorter timetable than a criminal trial. But three constraints bite hard. The Code binds candidates and parties, and a sitting Member of Parliament addressing a rally thirteen months before nomination is not obviously a candidate for its purposes. The Code operates by its own terms principally within the election period. And any sanction whose effect is to exclude a person from nomination is a disqualification in substance whatever it is called in form, and Kenyan courts have consistently looked to substance.

Fourth, and decisively, qualification for elective office is a constitutional matter. Articles 99 and 193 prescribe the qualifications and disqualifications for membership of Parliament and of a county assembly, and Articles 137 and 180 do the same for the Presidency and for the office of Governor. No statute, and certainly no administrative committee, may add a ground of disqualification that the Constitution does not contain. The only speech-adjacent route is Chapter Six read with Article 99(2), and it is at exactly this point that the drafters installed a brake which the multi-agency announcement appears to have overlooked. Article 99(3) provides that a person is not disqualified under Article 99(2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted.[33]

[33]Constitution of Kenya 2010, arts 99 and 193 (Parliament and county assemblies), arts 137 and 180 (President and Governor), and art 99(3) (exhaustion of appeal or review). See also arts 38, 47 and 50(2)(a).

Fifth, do the arithmetic on the calendar. A rally in August 2026. A complaint. An investigation of the kind described earlier in this article, requiring translation, sociolinguistic evidence and the certification of electronic material. A charging decision. A trial in a magistrate's court, in a system with the backlog Kenya has. A conviction, if one comes at all, perhaps in late 2027. An appeal to the High Court as of right. A second appeal to the Court of Appeal on points of law. Only when all of that is exhausted does Article 99(3) permit the disqualification to operate. The next General Election falls in August 2027. There is no plausible construction of the Kenyan criminal appellate timetable on which a person who spoke this month is disqualified from that ballot by reason of a conviction for what he said. The power is not imaginary in the sense that it does not exist anywhere in the statute book. It is imaginary in the only sense that matters to the person being warned, which is that it cannot arrive in time.

Sixth, the jurisprudence points the same way. The Kenyan courts have been consistent since the earliest Chapter Six litigation that integrity provisions require a process and a finding rather than an accusation, and that a person may not be excluded from public office on the strength of untested allegations.[34] The presumption of innocence in Article 50(2)(a) and the guarantee of fair administrative action in Article 47 point in the same direction. The one authority commonly cited for a more robust approach, the 2012 nullification of an appointment on the basis that the appointee faced hate speech and incitement charges, concerned an appointment to a state organ rather than a candidature, and even that line of reasoning has not been developed with anything like the vigour its supporters claim for it.[35]

Seventh, there is a constitutional objection of substance and not merely of timing. Disqualification from elective office is a disenfranchisement of an electorate as much as of a candidate. It removes from voters a person they might have chosen, and it does so in advance. That is a serious interference with the political rights guaranteed by Article 38, and it is precisely the sort of interference which a constitutional order channels through courts rather than through a committee of state agencies convened by press release and announced on the same day as the arrest of an opposition-aligned legislator. A power to remove candidates from the ballot on the say-so of an inter-agency body would be, in the Kenyan political environment, the most dangerous instrument in the state's possession. Those who welcome the announcement should ask themselves who will be operating that instrument, and against whom, in the eleven months to come.

What, then, is the announcement? There are two things. As a coordination mechanism it is potentially valuable, and the argument of this article supports that part of it. The defect in Kenyan hate speech enforcement is overwhelmingly investigative, and a standing arrangement between the Commission, the Directorate and the prosecutor for the early preservation of recordings, the prompt commissioning of translation and expert evidence, and the service of preservation notices on platforms at the moment a

[34] *Trusted Society of Human Rights Alliance v Attorney General & others* [2012] eKLR, on the requirements of Chapter Six of the Constitution.

[35] High Court proceedings of 2012 concerning an appointment to a state organ where the appointee faced hate speech and incitement charges (Mumbi Ngugi J).

complaint is lodged rather than eight months later, would address a genuine and long-standing failure. If the alliance does that and nothing else, it will have done more than any of its predecessors.

As a deterrence signal, however, it is likely to be worse than useless. A threat that is not carried out teaches the opposite of the intended lesson, and the Kenyan political class has eighteen years of evidence that this particular threat will not be carried out. Every unexecuted warning lowers the perceived cost of the next utterance. And an announcement made hours after a contested arrest, framed around a sanction the announcing bodies do not possess, will be read as what it appears to be: not a policy that produced an arrest, but an arrest in search of a policy.

What would make the power real? Four things, none of them beyond the competence of the current Parliament. A statutory basis, which the pending amendment to the cohesion legislation could supply. A determination procedure before the electoral Commission's Enforcement Committee with defined timelines, a civil standard of proof, and a right of appeal to the High Court on a fast track. A defined and deliberately modest menu of sanctions short of disqualification, comprising published retraction in the same medium and before the same audience, suspension from campaigning for a defined period, forfeiture of nomination fees and costs orders. And, critically, a demonstrated willingness to make the first determinations against speakers from the governing coalition. Absent that last element, the mechanism will be stillborn, and deservedly so.

VII. Six structural failures

Why does the threshold fail? Six reasons, in ascending order of difficulty.

First, definitional narrowness. Section 13 is confined to ethnic hatred, and ethnic hatred is defined by reference to colour, race, nationality and ethnic or national origins. Religion is absent. Gender is absent. Disability is absent. Sexual orientation is absent. Occupation, region and political affiliation are absent. Intra-ethnic political coercion of the kind examined in Part V is absent. This is a statute written in 2008 to address the wrong of 2007, and it has not been revisited. It cannot reach the vilification of persons with disabilities in political rhetoric, the sexualised degradation of women politicians that has become a staple of Kenyan online life, or religious incitement in the North Eastern counties. Article 33(2)(d) is far wider than section 13, extending to advocacy of hatred based on any ground of discrimination contemplated by Article 27(4). Parliament has legislated a fraction of its constitutional mandate.

Second, the mens rea puzzle. Section 13 offers the prosecution two routes: intention to stir up ethnic hatred, or circumstances in which such hatred is likely to be stirred up having regard to all the circumstances. The second limb is objective and dispenses with proof of purpose. On its face this is a gift to prosecutors. In practice it is a trap. A magistrate confronting the objective limb is being asked to convict a person of a three year offence without proof that he intended anything at all, on the basis of a probabilistic assessment of an audience's likely reaction. Kenyan courts, properly cautious about criminal liability without fault, tend to retreat to the intention limb, which the prosecution then fails to prove because intention to stir up ethnic hatred is almost never expressed and must be inferred from context that the prosecution has not troubled to assemble. The statute is simultaneously too wide to be principled and too narrow to be usable.

Third, the evidentiary problem, which is chiefly a problem of language. Kenyan political incitement is rarely explicit. It operates through proverb, allusion, agricultural metaphor and animal imagery. The speech that preceded the 2007 and 2008 violence spoke of weeds, of spots on a clean surface, of clearing land before planting. A prosecutor must establish the meaning of a Kalenjin, Kikuyu, Luo, Luhya or Somali metaphor to the satisfaction of a court, usually through a translator whose expertise is linguistic rather than sociolinguistic, and usually against a defence expert who will testify plausibly that the phrase is a commonplace with no violent connotation whatever. Where the utterance is digital, the prosecution must additionally satisfy the requirements for the admission of electronic evidence, including certification under section 106B of the Evidence Act, in circumstances where the original recording device is a phone belonging to a bystander who cannot be traced. Add to this the Inspector General's own observation that foreign-hosted platforms and encrypted communications complicate the collection of evidence where the content originates outside the jurisdiction,[36] and the evidentiary burden becomes, for practical purposes, insuperable.

Fourth, institutional design. The Commission investigates and recommends. It cannot prosecute. The decision to charge rests with the Director of Public Prosecutions under Article 157. This is constitutionally orthodox and practically fatal, because it introduces a discretionary gate at precisely the point where political pressure is greatest. Every file involving a serving Cabinet Secretary must pass through an office whose holder serves at the pleasure of a political appointment process. The Commission is thus structurally positioned to be blamed for a failure it lacks the power to prevent, a position illustrated with some precision by its public silence during the events of 3 August 2026.

Fifth, the sanction is mismatched to the wrong. A fine of one million shillings is a rounding error in the budget of a national campaign. A three year sentence is severe enough to make magistrates reluctant to convict on inferential evidence, and trivial enough not to deter a politician for whom a prosecution is a mobilising asset within his own community. As Part VI has shown, the one sanction that would matter is not available within the electoral cycle in which it is threatened. What is missing is the intermediate range: rapid, proportionate, civil consequences that arrive while the campaign is still running.

Sixth, and most corrosive, is the legitimacy deficit. A hate speech law is a law that asks citizens to accept restrictions on their speech in exchange for protection against vilification. That bargain collapses when the same statutory family is visibly used against protesters, bloggers, satirists and inconvenient legislators while leaving untouched the utterances of those aligned with the government of the day. Every acquittal of a student charged over a meme, every investigation of a former Deputy President that produces nothing, and every arrest of one speaker while a comparable utterance passes unremarked, teaches the same lesson. The framework is not experienced as a shield for the vulnerable. It is experienced as an instrument of the powerful.

[36] Capital FM (n 10).

VIII. Borrowed thresholds

If the Kenyan threshold is defective, what would a sound one look like? The comparative and international material is unusually rich, and unusually convergent.

The Rabat Plan of Action. Adopted in 2012 under the auspices of the Office of the High Commissioner for Human Rights, the Rabat Plan supplies the most widely endorsed articulation of the incitement threshold. It proposes a six part test: the social and political context in which the expression occurred; the status and influence of the speaker; the intent to incite the audience against a target group; the content and form of the speech; the extent and reach of its dissemination; and the likelihood of harm, including its imminence.[37] Two features deserve emphasis. The test is cumulative rather than indicative, so that the failure of any one limb defeats the charge. And on the likelihood limb, the Plan accepts that incitement is inchoate and that the advocated act need not occur, while insisting that a reasonable probability of success in inciting actual action must be established and that the causal relationship must be reasonably direct.[38] The Plan further insists that even where the threshold is met, sanctions must satisfy necessity and proportionality, and criminal responses must be a last resort.

Brandenburg. The American formulation requires that advocacy be directed to inciting imminent lawless action and be likely to produce such action.[39] The imminence requirement is stricter than anything Kenya could sensibly adopt wholesale, since it would exclude the slow accumulation of dehumanising rhetoric over an eighteen month campaign period which is precisely the Kenyan pathology. But the structural insight, that advocacy must be directed to the unlawful result and not merely capable of producing it, is directly transferable and would repair the defect in the objective limb of section 13.

Keegstra. The Supreme Court of Canada upheld the criminalisation of the wilful promotion of hatred, but did so on a reading that required wilfulness in the strict sense of purpose or knowledge of substantial certainty, that confined the prohibition to hatred in its most extreme sense, and that preserved statutory defences of truth, good faith religious argument and public interest discussion.[40] The Canadian model demonstrates that a criminal hate speech provision can be reconciled with a constitutional free expression guarantee, but only where the mental element is demanding and the defences are real.

Qwelane. The Constitutional Court of South Africa struck down part of the hate speech prohibition in the Equality Act for vagueness and overbreadth, holding that a prohibition framed around speech that is merely hurtful cannot survive constitutional scrutiny, and reading the provision down so as to require a clear intention to be harmful or to incite harm and to promote hatred.[41] The judgment is the closest comparative analogue to Kenya's position: a post-transitional constitutional order, an anti-discrimination statute drafted with the memory of mass

[37]Rabat Plan of Action (n 21) para 29; OHCHR, 'One-Pager on "Incitement to Hatred": The Rabat Threshold Test' https://www.ohchr.org/sites/default/files/Rabat_threshold_test.pdf accessed 3 August 2026.
[38]OHCHR (n 37), on likelihood and imminence.
[39]*Brandenburg v Ohio* 395 US 444 (1969).
[40]*R v Keegstra* [1990] 3 SCR 697 (SCC).
[41]*Qwelane v South African Human Rights Commission & another* [2021] ZACC 22, 2021 (6) SA 579 (CC).

violence, and a court insisting that memory does not license imprecision.

Nahimana. The Appeals Chamber of the International Criminal Tribunal for Rwanda, reviewing the convictions arising from Radio Télévision Libre des Mille Collines and *Kangura*, narrowed the trial chamber's approach considerably, distinguishing hate speech from direct and public incitement to commit genocide, insisting on the specific intent required for the latter, and declining to treat ethnically framed political discourse as incitement without more.[42] The tribunal that had every reason to adopt an expansive threshold declined to do so. That is instructive.

Ruto and Sang. Closer to home, the collapse of the Kenyan cases at the International Criminal Court, including the case against a broadcaster whose charges rested substantially on the dissemination of inflammatory content, is a reminder that the evidentiary difficulties described above are not a peculiarity of magistrates' courts.[43] They are intrinsic to the offence.

The convergence across these authorities is striking. Every serious adjudicator that has confronted the question has arrived at substantially the same place: purposive intent, contextual assessment, a real and not merely theoretical probability of harm, and criminal sanction as the exception rather than the rule.

IX. Can it work?

The question posed by this article admits an answer, and the answer is that the framework can work, but only if seven conditions are satisfied. Each is legislatively or institutionally achievable. None has been achieved.

One: codify the threshold. Kenya should amend section 13 to incorporate the Rabat criteria as express statutory elements, so that a court is directed to consider context, the speaker's status and influence, intent, content and form, extent of dissemination, and likelihood and proximity of harm, and so that the prosecution bears the burden on each. Codification does two things at once. It disciplines the charging decision, because a prosecutor confronted with a statutory checklist must assemble evidence on each limb before laying a charge, which will substantially reduce the volume of speculative prosecutions of low-status speakers and of inconvenient ones. And it supplies magistrates with a structure of reasoning, which is precisely what they presently lack. The National Cohesion and Integration (Amendment) Bill, 2025, which at last report had reached its third reading, is directed principally at expanding the Commission's procedural powers rather than at the substantive threshold.[44] That is a missed opportunity, and it is not too late to correct it.

Two: repair the mental element. The objective limb of section 13 should be recast. The correct formulation is that the accused intended to stir up hatred, or was aware of a substantial risk that his words would do so and proceeded regardless. That is recklessness properly defined, and it is a familiar standard in Kenyan criminal law. It captures the politician who knows exactly

[42] *Prosecutor v Nahimana, Barayagwiza and Ngeze* (Appeal Judgment) ICTR-99-52-A (28 November 2007).
[43] *Prosecutor v William Samoei Ruto and Joshua Arap Sang* (Decision on Defence Applications for Judgments of Acquittal) ICC-01/09-01/11 (5 April 2016).
[44] National Cohesion and Integration (Amendment) Bill 2025; 'New Bill Hands NCIC Swift Powers to Curb Hate Speech, Divisive Conduct' (*The Eastleigh Voice*, 11 December 2025) https://eastleighvoice.co.ke/news/253320/new-bill-hands-ncic-swift-powers-to-curb-hate-speech-divisive-conduct accessed 3 August 2026; 'EXCLUSIVE: NCIC Steps Up Action on Hate Speech as 2027 Polls Draw Closer' (*Radio Generation*, 29 April 2026) https://radiogeneration.co.ke/news/86507/exclusive-ncic-steps-up-action-on-hate-speech-as-2027-polls-draw-closer accessed 3 August 2026.

what his metaphor will do and disclaims responsibility for the reaction, while excluding the person whose words happen to be received badly.

Three: legislate for intra-communal coercion. Part V demonstrated that the dominant form of dangerous Kenyan campaign speech falls outside section 13 altogether, because it is directed by a speaker at his own community rather than at another. Two repairs are needed. Section 13 should be extended to the grounds contemplated by Article 27(4), which would capture political affiliation. And section 10 of the Election Offences Act should be brought out of desuetude, prosecuted, and if necessary amended to make clear that it operates throughout the period in which a General Election is in contemplation and not merely after nomination. A single successful prosecution under section 10 for a threat of spiritual injury would do more to discipline Kenyan campaign rhetoric than a decade of cohesion summonses.

Four: bifurcate the wrongs and abandon the disqualification fantasy. Kenya should create two tiers. The upper tier is criminal, confined to incitement to violence and to the most extreme forms of dehumanising vilification, with the codified threshold above and with a sentence that reflects the gravity of the wrong. The lower tier is civil and administrative, addressed to ethnic contempt, vilification and electoral coercion, adjudicated by the Commission or by the electoral Enforcement Committee with a right of appeal to the High Court, and carrying remedies that are actually apt and actually available before the election: mandatory retraction, published apology in the medium in which the words were uttered, suspension from campaigning for a defined period, compensation to identified complainants, forfeiture of nomination fees and costs orders. This is the single most important reform available, because it removes from the criminal law the great mass of cases it cannot handle, and because it replaces a sanction that cannot arrive in time with sanctions that can.

Five: invest in the evidentiary infrastructure. This is unglamorous and indispensable. It requires a standing panel of sociolinguistic experts competent in the major Kenyan languages and able to testify to the connotation of political metaphor. It requires forensic capacity for the preservation and certification of digital evidence, including preservation orders directed to platforms at the moment a complaint is lodged rather than eight months later. It requires trained prosecutors, and it requires the specialised courts established in 2021 for the 2022 cycle to be reconstituted, resourced and given a continuing rather than an electoral mandate. This is the part of the multi-agency announcement that deserves support.

Six: legislate the digital layer with precision. The lesson of the Court of Appeal's March 2026 judgment is not that online speech cannot be regulated. It is that vagueness is fatal. Sections 22 and 23 fell because they were capable of catching persons who shared information not knowing it to be false, which is to say almost everybody.[45] Any provision addressed to online incitement must specify the mental element, must identify the harm with precision, and must be narrower than its offline equivalent rather than wider, because the enforcement discretion available in the digital environment is so much greater. The pending Supreme

[45] *BAKE* (n 6).

Court proceedings on the surveillance and interception provisions will determine how much of the 2018 architecture survives,[46] and Parliament would be well advised to await that outcome before further amendment.

Seven: take the positive obligations seriously. Article 20(2) of the Covenant obliges States to prohibit incitement. It does not oblige them to prosecute their way out of ethnic polarisation, and no State has ever managed it. The Rabat Plan is emphatic that criminal sanction is a last resort and that the primary response lies in counter-speech, in pluralist education, and in the removal of the structural grievances that make ethnic mobilisation profitable. In Kenya the structural grievance is the winner-take-all character of executive power, and no amount of speech regulation will address it. The Commission's own diagnosis, which links unrest to low institutional trust, is closer to the mark than its enforcement agenda.

X. The criticism from 2007

There is a serious objection to the argument advanced here, and it should be stated in its strongest form.

The objection runs as follows. Kenya is not an ordinary jurisdiction and cannot afford an ordinary threshold. Between December 2007 and February 2008 more than eleven hundred people were killed and more than six hundred thousand displaced, and the violence was preceded, accompanied and directed by speech: by vernacular radio, by rally rhetoric, by text message. A threshold calibrated to Brandenburg or to Rabat, which requires proximity and probability and cumulative satisfaction of six elements, would have protected almost every utterance that preceded that violence, because almost none of it was explicit and almost none of it was proximate. A country that has burned once has the right to legislate a lower threshold than a country that has not. And a man who tells a Nyeri crowd that its neighbours will be driven from their homes should be arrested on Monday morning, not investigated for eighteen months.

The objection is powerful and it is wrong, for three reasons.

The first is empirical. Kenya already has a low threshold. Section 13's objective limb requires no proof of intent at all. Section 96 of the Penal Code reaches any words indicating that it is desirable to do anything calculated to prejudice the public peace, which is about as low as a threshold can be drawn. The low threshold has not produced prosecutions of the powerful. It has produced prosecutions of the powerless and of the oppositional. Lowering a threshold does not redistribute enforcement; it expands the discretion of those who already control enforcement, and in Kenya that discretion has been exercised with entire consistency in one direction. The argument from 2007 assumes that the constraint on prosecuting incitement is doctrinal. It is not. It is political, and no doctrinal loosening will touch it.

The second is that a high and precisely drawn threshold is not an obstacle to prosecuting the speech of 2007. It is the only thing that would have made such prosecutions survivable on appeal. The Rabat criteria of speaker status, extent of dissemination and social context are tailor-made for the vernacular broadcaster

[46] See (n 7).

with a mass audience in a polarised pre-election environment. What defeats such a prosecution is not the demand for context. It is the absence of a statutory framework requiring investigators to gather it. A codified threshold is a set of instructions to the investigator as much as to the judge, and Kenya's failure has been overwhelmingly investigative.

The third answer is the one supplied by the first week of August 2026. The objection assumes that a lower threshold and swifter arrest produce protection for the vulnerable. What they produced in that week was the arrest of one speaker and the untroubled continuation of another, in circumstances where the doctrinal case for acting against the second was, if anything, cleaner than the case against the first. Speed without a threshold is not enforcement. It is selection.

XI. The 2027 horizon

Kenya enters the next general election cycle with a Commission newly constituted, a chairperson sworn in three months ago, an amendment Bill in its final parliamentary stages, a substantial portion of the digital speech architecture struck down and the remainder before the Supreme Court, a nine-member inter-agency alliance announced with a sanction it does not possess, and a political class that has spent the preceding two years discovering that ethnic and factional mobilisation remains the cheapest available electoral technology. The Commission and the Inter-Religious Council have both warned of rising political intolerance and of language increasingly used to cast whole communities as adversaries.[47]

The prediction that follows from the analysis above is not difficult. Absent the reforms described, the cycle will produce a large number of investigations, a small number of summonses, a smaller number of charges, and approximately zero convictions of any person aligned to the governing coalition. It will simultaneously produce a steady stream of arrests of persons who are not so aligned, conducted before any charge has been formulated and justified afterwards by reference to a multi-agency framework that possesses no relevant power. Both outcomes will be reported as failures of the Commission, and both will in fact be failures of Parliament, which has had eighteen years to draft a workable threshold and has not done so, and failures of the prosecutorial office, which has had the whole of that period to demonstrate that Article 157(11) means something.

The alternative is available and is not expensive. It requires a Bill of perhaps fifteen clauses: codification of the six criteria, restoration of a proper mental element, extension of the protected grounds to those contemplated by Article 27(4), express provision for intra-communal electoral coercion, bifurcation of the criminal and civil tiers, and a defined determination procedure before the electoral Enforcement Committee with proportionate sanctions and a fast-track appeal. It requires an investment in linguistic and forensic capacity that would cost less than a single county's annual travel budget. And it requires the Office of the Director of Public Prosecutions to charge one senior figure from the governing side, on evidence assembled to the codified standard, and to see the matter through to judgment.

That last requirement is the one on which everything turns, and it is the one that no amendment can compel.

[47] Citizen Digital (n 14).

XII. Conclusion

Return to the market town, and to the man in the red shirt in the eleventh minute.

Under the framework as it stands, what happens to him depends on a variable that appears nowhere in the National Cohesion and Integration Act. If his eleventh minute threatens a community that the government of the day has no particular interest in protecting, almost nothing will happen. A complaint will be lodged. It will join forty two others. If he becomes prominent enough to be inconvenienced, he may be summoned, and he will apologise, and the apology will be reported, and his standing in the constituency will be marginally improved by the demonstration that he is feared. If instead his eleventh minute threatens people who support the President, he may be arrested on Monday morning before anyone has decided what offence he has committed, and a coalition of nine agencies may announce, some hours later, that people like him will be barred from the ballot, which they will not be, because none of the nine has the power to bar anybody from anything.

Under the framework proposed here, something rather different would happen. The investigator would be under a statutory duty to gather evidence on six defined matters, beginning with the social and political context of the constituency, the speaker's standing and influence, and the reach of the recording. The Commission or the Enforcement Committee would have power to make a civil determination within a defined period, requiring a published retraction in the same medium and before the same audience, and suspending him from campaigning for a defined term. The criminal file would proceed only if the codified elements were satisfied, which on these facts they might well be. And the same duty, the same period and the same determination would apply to the elder on television, to the Cabinet Secretary at the fundraiser, and to the Member of Parliament at Kieni, because a threshold that applies to one of them and not the others is not a threshold at all.

The difference between the two scenarios is not the severity of the law. Kenya's law is already severe, and the events of this month demonstrate that it can be applied with considerable speed when the state wishes. The difference is that in the second scenario the law is capable of being applied, by an ordinary magistrate, to an ordinary defendant, on evidence that an ordinary investigator can be instructed to collect, and by a state that has told the public in advance what the rule is. That is what a threshold is for. A threshold is not a measure of how much a society disapproves of a form of speech. It is a promise that the disapproval will be applied to the powerful and the powerless on the same terms, and it is the absence of that promise, rather than any deficiency of statutory language, that has hollowed out eighteen years of Kenyan hate speech law.

Whether it can work is therefore not, in the end, a question about section 13. It is a question about whether Kenya is prepared to be governed by a law that binds the man on the flatbed, the elder in the studio and the man in the Cabinet in the same sentence. The law can be written. It has been written elsewhere. The question is only whether it will be written here, and on the evidence of the first week of August 2026, the answer is not encouraging.

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A toast to integration or a hangover of distrust? Rwanda's alcohol ban and East Africa's harmonization dilemma

By Alvin Kubasu

Introduction

In his book, ***Things Fall Apart***, Chinua Achebe notes that food is not just for eating, it is a symbol of wealth, power, and connection. He goes a great mile to demonstrate that indeed the highest form of consideration one can give is food that they themselves would deem it of excellent quality. And that there exists a fiduciary trust that whatever is offered to the guest will certainly do no harm to the eater rather nourish them, thus this trust transcends food to build a coherent community.

Perhaps in a bid to draw from Chinua Achebe's fountain, the Treaty Establishing the East African Treaty (EAC Treaty) advocates the fundamental principles of the community to include political will and sovereign equality, peaceful co existence and good neighbourliness, peaceful settlement of disputes and good governance; and key to them all the principle of mutual trust.[1] Trust that the commitments willingly entered into will be kept, trust that the borders will remain open to each and every citizen, trust that the shared resources will be prudently (and fairly utilized), trust that intra-EAC trade can take place without unnecessary hindrances.

At the pinnacle of this mutual trust lies a subtle yet pivotal role of the individual Partner States institutions. From quality assurance to security, there exists the trust that once citizens from one country cross -over to the other, they will be safe. Further, that only products which have met the acceptable quality will be allowed to be in circulation in the domestic market and be allowed to cross the border to the other EAC Partner States.[2]

On the 8th of August 2026, the fragile trust among EAC Partner States was once again put to test, Rwanda through the Rwanda Food and Drugs Authority enacted a ban and nationwide recall of 52 imported alcoholic beverages brands, citing the failure to meet (Rwanda) national safety and quality requirements.[3] Consequently,the Rwandan health inspectors directed that importers, distributors, and hospitality

[1] Treaty for the Establishment of the East African Community (signed 30 November 1999, entered into force 7 July 2000) (EAC Treaty), Article 6.
[2] Ikirezi Adawi, 'EAC moves to harmonise food safety rules to ease cross-border trade' (*Umunota*, 22 August 2026) https://umunota.com/en/eac-moves-to-harmonise-food-safety-rules-to-ease-cross-border-trade/
[3] Kenneth Gachie, 'Kenyan spirits face growing scrutiny as Rwanda recalls 52 alcohol brands' (*Citizen Digital*, 11 August 2026). https://citizen.digital/article/kenyan-spirits-face-growing-scrutiny-as-rwanda-recalls-52-alcohol-brands-n388106

areas (restaurant, bars, etc) to immediately stop all sales, clear the store shelves and the remaining inventory be returned in adherence to strict regulatory supervision.[4] Among the 52 affected brands some of the most sought after Kenyan, Ugandan and Tanzanian alcoholic brands featured.[5] The Rwandan authorities in a further statement stated that the products will be subjected to exhaustive chemical analysis.[6] While this was ongoing, both Kenyan and Ugandan quality assurance institutions hit out at the ban insisting that the products in issue had met the requisite standards.[7]

In the middle of the tussle and hustle involving 'the waters of immortality, and the stumbling stallion that never refuses to gallop,' the most prevalent question remains, when did the rains start beating us?

The genesis

While they have been reports and concerns raised over the production of counterfeit alcohol in Kenya,[8] the straw that broke the camel's back on heightened scrutiny on alcoholic brands was when the UK flagged Kenya as a hub to counterfeit alcohol in the EAC region.[9] In July 2026, the United Kingdom's Foreign, Commonwealth & Development Office updated its global travel advisories flagging Kenya among nations with high risks of counterfeit alcohol and severe methanol contamination.[10] The UK government included Kenya among 29 countries in which British citizens face a high risk of methanol poisoning due to adulterated alcohol.[11] This adulteration has been noted to be common in spirit-based drinks, causing catastrophic side effects including death.[12] The advisory noted that there is widespread contamination of drinkable alcohol with industrial chemicals in Kenya, with methanol (instead of ethanol) being the common chemical used.

The move to use methanol has been attributed to the fact that it is not only significantly cheaper but also that it is almost indistinguishable to ethanol when it comes to taste, smell, and appearance, thus making it a key additive to spike low quality alcohol while making it achieve almost similar outcome as authentic alcohol.[13]

Resulting from the UK advisory, there has been mounting tensions locally, regionally and internationally regarding the purity, safety and general integrity of spirit based products originating from Kenya and the greater East Africa Community. [14]This therefore pushed Rwanda to embark on an enforcement action that sought to establish the quality standards of the alcoholic products from around the world and also across the EAC region, which culminated in the banning of the 52 alcoholic brands with the EAC countries getting caught in the cross hairs of the sweeping action.

Following the ban by Rwanda, the Kenya

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[4]Ibid.
[5]Isaac Opio, 'Kenya Rejects Rwanda Suspension of Five Alcohol Brands' (ChimpReports, 12 August 2026) https://chimpreports.com/kenya-rejects-rwanda-suspension-of-five-alcohol-brands/
[6]Gachie (note 3).
[7]Opio (note 5)
[8]John Mutegi Rewa, John R Kisilu and James K Kibon, 'Counterfeit Alcohol as a National Security Threat in Kenya: Kiambu County Case Study' (2026) 10(5) *International Journal of Research and Innovation in Social Science* 12542.
[9]Gachie (note 3).
[10]Hellen Shikanda, 'Kenya flagged in UK warning over deadly methanol-laced alcohol' (*Daily Nation*, 2026).
[11]Ibid.
[12]Kenneth Gachie, 'Kenyan spirits face growing scrutiny as Rwanda recalls 52 alcohol brands' (Citizen Digital, 11 August 2026).
[13]Hellen Shikanda, 'Kenya flagged in UK warning over deadly methanol-laced alcohol' (*Daily Nation*, 2026).
[14]Kenneth Gachie, 'Kenyan spirits face growing scrutiny as Rwanda recalls 52 alcohol brands' (Citizen Digital, 11 August 2026).

Bureau of Standards (KEBS), the institution tasked with quality assurance in Kenya came out in defence of the affected Kenyan products. In a statement on the 12th of August, KEBS stated that it reviewed the decision and found no evidence that the products in issue failed the requisite tests.[15] The statement went on further to assure consumers, traders, and the market in general that the products in issue had been subjected to market surveillance, factory inspection and laboratory testing and been ascertained to meet both the Kenyan and the East African standards and that they bore the standard mark of quality.[16] These were sentiments that were also shared by the Uganda National Bureau of Standards concerning their affected products.[17]

Standardization of standards and mutual recognition

These developments add an additional layer of complication on the growing initiative for the harmonisation of food safety rules to ease cross-border trade. EAC Partner States have remained committed towards the eradication of Non-Tariff Barriers (NTBs) in cross border trade.[18] A significant contributor of NTBs has been the numerous duplicate standards that products are subjected to by every Partner State as they move from one border to another.[19] These have pushed Partner States to advocate for the establishment of uniform requirements in inspection, certification and control of food and beverages.[20]

To this end products that meet the standards in one Partner State will be allowed to move to other countries without the need for duplication in compliance tests. This is in line with the requirement under the East Africa Community Protocol on Standardisation Quality Assurance Metrology and Testing (SQMT Protocol), which requires Partner States to have a common policy on standardisation, quality assurance, metrology and testing of products that are produced and traded within the EAC.[21] Further, the Partner States are required to adopt and implement East African Standards as national standards.[22]

In the promotion of quality assurance, Partner States are called upon to harmonise procedures for inspection, sampling and testing of products, and develop adequate capacities for guaranteeing quality.[23] When it comes to testing of products, partner States are required to develop competence of repeatability and reproducibility of test results and promote recognition of test certificates and establish procedures for validation of test methods among others.[24]

To realize these obligations, the partner states through the East African Legislative Assembly enacted the East Africa Community Standardisation Quality Assurance Metrology and Testing Act with an aim to protect health and safety of

[15]Isaac Opio, 'Kenya Rejects Rwanda Suspension of Five Alcohol Brands' (ChimpReports, 12 August 2026).
[16]Ibid.
[17]Nelson Naturinda, 'Uganda joins Kenya in opposing Rwanda ban on alcoholic drinks' (*The EastAfrican*, 15 August 2026).
[18]Ikirezi Adawi, 'EAC moves to harmonise food safety rules to ease cross-border trade' (Umunota, 22 August 2026).
https://umunota.com/en/eac-moves-to-harmonise-food-safety-rules-to-ease-cross-border-trade/
[19]Hanningtone Amol, 'A Critique of the East African Community's Non-Tariff Barriers Regime' (2023) 2(1) African Journal of Commercial Law 153.
[20]Ibid.
[21]Protocol on Standardisation, Quality Assurance, Metrology and Testing (2001) Article 3.
[22]Protocol on Standardisation, Quality Assurance, Metrology and Testing (2001) Article 4.
[23]Ibid.
[24]Protocol on Standardisation, Quality Assurance, Metrology and Testing (2001) Article 5.

Rwanda's suspension of dozens of imported alcoholic beverages has triggered more than a trade dispute with Kenya and Uganda. It poses a fundamental question for the East African Community: can there be a genuine common market when national regulators disagree over what constitutes a safe and compliant product?

consumers, enhance the quality, reliability and reputation of the products within the EAC. There was also the desire to harmonise national and East African Standards with international standards to reduce costs, enhance compliance and develop trade opportunities in the region.[25]

The Act goes on to establish the East African Standards Committee and task it with undertaking and coordinating standardisation, metrology and conformity assessments.[26] However, the foundational setup of this committee is perhaps its biggest hindrance to realising its mandate. The Committee is merely an extension of partner states quality assurance institutions, thus limiting its ability to function as an independent regional entity capable of coming up with and enforcing uniform standards across the region.

Despite partner states being reluctant to embrace the mutual recognition of individual partner States quality assurance and testing standards, Rwanda through the Food and Drugs Authority has been the pace-setter by recognising valid product

[25]East African Community Standardisation, Quality Assurance, Metrology and Testing Act 2006, Section 3.
[26]East African Community Standardisation, Quality Assurance, Metrology and Testing Act 2006, Section 4.

certification that have been issued by other partner states quality assurance institutions.[27] This has meant that for traders and manufacturers, their products enjoy reduced delays and lower production costs as products are not subjected to additional tests, ultimately making it easier for intra-EAC trade.

This has been significantly beneficial in the food processing and export sector since they have to meet safety, quality, labelling and certification requirements before their products cross to other EAC countries.[28] The impact of this mutual recognition can be demonstrated from the Rwanda Food and Drugs Authority 2024/2025 data, which showed that the authority had inspected more than 10,700 consignments and processed their licences after availing valid certification from the country of origin.

Conclusion

The ban on some alcoholic brands from Kenya, Uganda, and Tanzania by Rwanda represents more than a regulatory dispute over quality standards, rather a stress test for the very foundations of East African integration. Indeed, Rwanda's action finds legal refuge in Article 36 of the Common Market Protocol, which permits partner states to protect consumer health and safety.[29] The actual damage lies not in the ban itself but in what it reveals about the persistence of mutual distrust despite decades of integration efforts. The SQMT Protocol and the push for harmonized standards were designed precisely to prevent such occurrences, yet the institutional machinery remains captive to national interests, with the East African Standards Committee operating as little more than an extension of partner states' domestic agencies instead of a robust, independent arbiter capable of enforcing uniform standards. If alcoholic beverages products which are often subjected to some of the most rigorous quality controls can actually trigger such a profound breakdown of mutual recognition, then what confidence can traders, investors, or consumers have in the integrity of other goods, services, or professionals moving across borders? Whereas the UK travel advisory may have been the immediate catalyst, the deeper crisis is one of institutional credibility and political will across the region. For the EAC to move beyond this impasse, Partner States must resist the temptation to retreat into defensive postures and instead confront the uncomfortable truth, that mutual recognition cannot flourish where regulatory capture, illicit production networks, and opaque supply chains persist. The path forward demands not merely rhetorical commitment to harmonization but definitive and concrete investment in joint enforcement mechanisms, independent dispute resolution, and transparent data-sharing that can rebuild the fiduciary trust that Chinua Achebe so eloquently identified as the bedrock of any coherent community. Without such measures, the EAC risks becoming a common market in name only where borders are nominally open but confidence remains closed, and where each ban, each advisory, and each defensive statement inches the region further away from the integration it so fervently professes to pursue.

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[27] Ikirezi Adawi, 'EAC moves to harmonise food safety rules to ease cross-border trade' (Umunota, 22 August 2026). https://umunota.com/en/eac-moves-to-harmonise-food-safety-rules-to-ease-cross-border-trade/

[28] Ibid.

[29] Protocol on the Establishment of the East African Community Common Market (signed 20 November 2009, entered into force 1 July 2010), Article 36.

COVER STORY

World Trade Organization (WTO) compliance and climate equity: Assessing the European Union's Carbon Border Adjustment Mechanism (CBAM) in the context of global trade

By Michael Mburu

Abstract

This paper draws inspiration from 2023, when the EU launched a Carbon Border Adjustment Mechanism (herein after CBAM) Policy that sought to add a climate levy for goods produced from carbon-intensive markets. CBAM is a policy designed to ensure imported goods entering the EU are subject to carbon pricing, similar to what domestic producers already face under the EU Emissions Trading System (ETS). This aims to prevent carbon leakage, which occurs when companies shift production to countries with lower carbon regulations, and to encourage cleaner industrial production globally. The CBAM will be fully implemented in 2026, with a transitional phase running from 2023 to 2025. This paper assesses the European Union's CBAM through the dual lenses of international trade law and climate equity. It argues that while designed to prevent carbon leakage, the CBAM's uniform application risks violating World Trade Organization (WTO) principles such as National Treatment and Non-discrimination,

World Trade Organization (WTO) compliance and climate equity examines how governments can pursue climate action while respecting international trade rules and ensuring that developing countries are not unfairly disadvantaged.

by disproportionately burdening developing nations like Kenya. The analysis in the paper shows that the mechanism clashes with the Common But Differentiated Responsibilities (CBDR) principle of international climate law, effectively shifting the EU's mitigation costs onto nations with limited resources and historical responsibility for emissions. It concludes that the CBAM, in its current form, functions as a de facto protectionist measure that undermines global trade fairness and climate justice, and proposes *equitable alternatives centered on technical assistance, differentiated pricing, and multilateral cooperation.*

Key Words: *CBAM, Climate Equity, WTO, CBDR, Carbon leakage, Non- discrimination, MFN.*

Introduction

"Border carbon adjustments must be designed in a way to advance climate goals, foster fair competition and promote international commerce. And, crucially, they must not constitute – or be perceived as – a means of arbitrary discrimination or disguised protectionism." *[1]

In the Marrakesh Agreement establishing the WTO,[2] members established a clear link between sustainable development and disciplined trade liberalization to ensure that market opening goes hand in hand with environmental and social objectives. In the ongoing Doha Round, members went further in their pledge to pursue a sustainable development path by launching the first-ever multilateral trade and environment negotiations.[3] It would be instructive to note this early on that Trade ought to be liberalised for countries equally because discriminatory policies beget political, social and economic crises at the international level. Some rules and regulations were directly required to regulate this liberalisation process and to the discriminatory policies to avoid the influence of the international key players such as the United States, Canada, Japan, the United Kingdom and China in international trade and the negotiation process for the tariff.[4]

Climate change has become a central challenge for international economic governance. As countries adopt stricter domestic climate measures, trade policy is being used to extend these regulations internationally. One of the most significant examples is the European Union's Carbon Border Adjustment Mechanism (CBAM). It places a carbon price upon certain imported goods, aligning their cost with domestic EU production under the Emissions trading System (ETS).

The CBAM was introduced on October 1st, 2023, as part of the EU's "Fit for 55" package, designed to reduce net greenhouse gas emissions by at least 55% by 2030, compared to the 1990 levels.[5] The Carbon Border Adjustment Mechanism (CBAM) is the EU's tool to put a fair price on carbon emitted during the production of carbon-intensive goods that are entering the EU, and to encourage cleaner industrial production in non-EU countries. The mechanism imposes a carbon price on imports of certain carbon-intensive goods, aligning the cost of non-EU products with that of EU-produced goods, thus preventing carbon leakage. Integral to the success of the CBAM is the EU Emissions Trading System (EU ETS),[6] a cornerstone of the

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[1]As John W.H. Denton, AO Secretary General, ICC, stated in the ICC Global Trade Report 2023.
[2]WTO, 'WTO | Legal Texts - Marrakesh Agreement' (Wto.org2017) https://www.wto.org/english/docs_e/legal_e/marag_e.htm
[3]World Trade Organisation, 'WTO and the Challenge of Climate Change' WTO, 2019 - https://www.wto.org/english/tratop_e/envir_e/climate_challenge_e.htm. (herein after WTO Climate Challenge Report).
[4]Ullah I, 'Most Favoured Nation Principle and National Treatment Obligation and Their Efficacy in Elimination of the Discrimination' Al Manhal Research Journal 2(2), 2022 -https://almanhal.org.pk/ojs3303/index.php/journal/article/view/17.
[5]European Commission, 'Carbon Border Adjustment Mechanism' (European Commission2025) <https://taxation-customs.ec.europa.eu/carbon-border-adjustment-mechanism_en>.
[6]European Commission, 'EU Emissions Trading System (EU ETS)' (Climate Action2025) https://climate.ec.europa.eu/eu-action/carbon-markets/eu-emissions-trading-system-eu-ets_en

EU's climate policy, and its primary tool for cost-effective greenhouse gas emissions reduction. Launched in 2005, the EU ETS is the world's oldest and one of the largest carbon markets.

Its stated purpose is to prevent carbon leakage- where firms relocate production to countries with weaker climate regulation, and to protect the efficacy of EU climate policies.[7] Designed to prevent carbon leakage, where industries relocate to jurisdictions with weaker climate regulations, CBAM imposes a carbon price on imports of certain goods to align with the EU's domestic carbon pricing under the Emissions Trading System (ETS).[8] The goods that CBAM will initially apply to are imports whose production is carbon-intensive and at most significant risk of carbon leakage: cement, iron and steel, aluminium, fertilisers, electricity and hydrogen.[9]

The price of imports is calculated by adding a financial charge corresponding to the embedded carbon emissions of the goods, based on weekly average EU Emissions Trading System (ETS) allowance prices. Importers must pay a higher fee if the product's carbon intensity is higher, ensuring it matches the carbon price paid by domestic EU producers.[10] It aims to ensure that the price of imports reflects their carbon content, encouraging cleaner production practices globally while protecting EU production under potentially stricter carbon emissions-related regulatory frameworks.. Under the CBAM, the carbon price is the cost per tonne of Carbon (IV) oxide emitted during the production of goods imported into the EU. It is designed to mirror the price of carbon paid by EU producers under the EU Emissions Trading System (EU ETS).

As a regulatory market established by policymakers, the EU ETS operates on a "cap and trade" system, setting an overall limit (or "cap") on the total greenhouse gas emissions allowed from covered sectors. This cap is gradually lowered, reflecting the reduction targets set by EU policymakers, and operates under the polluter pays principle.[11]

The concern raised by developing nations like Kenya is that there would be a potential of violating various international trade and climate–related principles, in that, the CBAM would impose an unjust burden on developing nations, which lack the economic resources to swiftly transition to low-carbon economies. Making the shift to a low-carbon and green economy is essential for a number of reasons. It lessens the negative consequences of climate change, encourages sustainable growth, and may have positive economic implications by creating jobs in green technologies. Furthermore, the shift is not only advantageous but also required due to the depletion of natural resources and the worsening of the environment.[12]

This paper is premised upon examining the key principles of international trade law,

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[7]Ibid.

[8]European Commission, 'EU Emissions Trading System (EU ETS)' European Commission, 2023 - https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets_en

[9]Ibid.

[10]Jing Cao and others, 'Carbon Markets and Carbon Tariffs: Effect on World Trade and Emissions' (2023) http://www.igd.tsinghua.edu.cn/Cao.pdf accessed 6 February 2026.

[11]Dittmeyer H, 'New Study: Exploring the Impact of the EU's Carbon Border Adjustment Mechanism (CBAM) on Kenya's Key Sectors' Delegation of German Industry and Commerce in Kenya12 June 2024 - https://kenia.ahk.de/en/news/new-study-exploring-the-impact-of-the-eu-s-carbon-border-adjustment-mechanism-cbam-on-kenya-s-key-sectors

[12]In Sustainability, 'Low-Carbon Economy: Its Importance in Sustainability Efforts' (2025) https://creit.com.ph/press-room/blogs/low-carbon-economy/ accessed 6 February 2026.

non-discrimination, fairness, predictability, and environmental exceptions, and assessing how CBAM interacts with them. In terms of non-discrimination, does CBAM treat imports fairly versus domestic products? It shall explore the tensions between unilateral climate measures and multilateral trade obligations, particularly for developing economies like Kenya.

Section 1: Principles in International Law International Trade Law

i. The most favoured nation principle

The Most Favored Nation (MFN) Principle under Article 1 of the General Agreement on Trade and Tariffs (GATT) requires that any trade advantage granted to one WTO member state must be extended to all others. Indeed, the CBAM shall be applied uniformly across all trading partners, and it therefore ostensibly complies with the MFN since it does not favour one country over another. However, this is only at face value. A *de facto* discrimination would arise since CBAM disproportionately affects developing nations with high carbon-intensive production. It is not in dispute that developing nations, like the Republic of Kenya, tend to have less stringent climate change policies and their production is generally more carbon-intensive than developed nations.

CBAM focuses on carbon-intensive commodities, meaning any business that imports or exports these goods to the EU will be affected, either directly or indirectly. Importers of these goods will need to declare under CBAM. Consequently, customers in the EU will request carbon data for the products they purchase directly from their non-EU suppliers.[13] This includes industries of Aluminium, iron and steel, electricity, fertilizer, cement, and hydrogen.

It was established in the Panel Report, that the burden of proof in determining a 'less favourable' treatment must incorporate that the formal differential treatment has modified the conditions of competition.[14] The test of whether a measure provides less favorable treatment examines if the measure has the potential to apply less favourable treatment to imported goods of particular countries.[15] If the measure modifies the conditions of competition in a way that negatively impacts services or service suppliers from another Member, this alone can establish a finding of less favorable treatment under Articles II:1 and XVII of the General Agreement on Trade in Services (GATS).[16] This can be achieved by showing that CBAM deters imports and that attendant costs make it harder to compete normally with other countries. Article X:3 of the GATT 1994 requires that members administer their trade regulations in a fair, reasonable, and impartial manner. CBAM may be inconsistent with Article X:3 if, in practice, it imposes a higher administrative burden on imported goods compared to domestic goods.[17]

ii. The national treatment principle

This principle of "national treatment" (giving others the same treatment as one's own nationals) is found in all three main WTO

[13]The Carbon Trust, 'CBAM: What It Means for Businesses' The Carbon Trust, 6 January 2025 - https://www.carbontrust.com/our-work-and-impact/guides-reports-and-tools/cbam-what-it-means-for-businesses (hereinafter Carbon Trust, CBAM for Business)
[14]Panel Report, China – Publications and Audiovisual Products, paras. 7.978-7.979.
[15]WTO Appellate Body Report, EC – Bananas, paras 231-234.
[16]WTO Appellate Body Report, Argentina – *Financial Services*, para. 6.109.
[17]Akin Gump Strauss Hauer & Feld LLP, 'EU Reaches Provisional Agreement on Carbon Import Charge' Akin Gump, 2023 - https://www.akingump.com/en/insights/alerts/eu-reaches-provisional-agreement-on-carbon-import-charge accessed 17 May 2025. (hereinafter Akin Gump CBAM Alert).

agreements (Article 3 of GATT, Article 17 of GATS, and Article 3 of The Agreement on Trade-Related Aspects of Intellectual Property Rights(TRIPS)), although in each, it is handled differently.

Grounded in those WTO agreements, the NTP seeks to advance the treatment of foreigners and locals equally. Importantly, imported and locally-produced goods should be treated equally after the foreign goods have entered the market. The same should apply to foreign and domestic services, and to foreign and local trademarks, copyrights, and patents. National treatment only applies once a product, service, or item of intellectual property has entered the market. Therefore, charging customs duty on an import is not a violation of national treatment even if locally produced products are not charged an equivalent tax.[18]

The EU argues that CBAM ensures competitive neutrality by imposing equivalent carbon costs on imports and domestic products. However, there are challenges arising with this approach. To help countries prepare for the significant impacts on competition of exporting and importing goods, the World Bank developed the CBAM exposure index. One major challenge involves methodological discrepancies that arise when calculating embedded emissions.[19] Importers may face default values based on the worst-performing EU producers, which could be more punitive than actual emissions.

Another concern relates to Indirect emissions under Scope 2 of the Green House Gas Protocol,[20] which are excluded from some sectors, such as aluminium, in CBAM, but they are included in the original EU ETS, which now raises the question of unequal treatment. Basically, under the GHG protocol, scope 1 and scope 2 of the carbon footprint differ primarily in the nature of the emissions they cover. Scope 1 concerns direct greenhouse gas (GHG) emissions from sources owned or controlled by the company, such as the combustion of fossil fuels in boilers, company vehicles and industrial processes.[21] In contrast, scope 2 encompasses indirect emissions related to the energy purchased and consumed by the company, such as electricity, heat, steam, and cooling. These emissions are produced by energy suppliers but are attributed to the company due to its consumption.[22]

To understand how the calculation is done in the CBAM exposure index, consider the following: A country's exposure to the CBAM for any good can be measured in absolute terms, reflecting the total potential cost of certificates for its exporters, and in relative terms, reflecting the effect of the policy on their competitiveness in EU markets. To estimate the cost of certificates, we assume a carbon price of $100 per ton. Then we calculate how many tons of carbon are emitted for each dollar of the good, its carbon intensity. We multiply the resulting unit cost by the total value of exports to the EU to get the total potential cost of certificates. The cost of certificates is calculated by calculating the carbon intensity of each dollar of the goods and multiplying it by the total value of exports to the EU. This reveals that exporters with more

[18]European Commission, 'Carbon Border Adjustment Mechanism' European Commission, 28 March 2025 - https://taxation-customs.ec.europa.eu/carbon-border-adjustment-mechanism_en
[19]Escrig P, 'Embodied Carbon Emissions: Meaning and Measurements' E3G, 14 February 2023 - https://www.e3g.org/news/embodied-carbon-emissions-meaning-and-measurements/
[20]Greenhouse Gas Protocol, 'Greenhouse Gas Protocol' (Ghgprotocol.org) https://ghgprotocol.org/
[21]Jaimish, 'Scope 2: Indirect Emissions | D-Carbonize' (D-Carbonize14 July 2024) https://d-carbonize.eu/blog/carbon-accounting-scope-2/ accessed 17 March 2026.
[22]Ibid.

products to EU markets are more exposed to potential CBAM costs.

iii. The prohibition of quantitative restrictions

This provision can be found in Article XI of the GATT. CBAM is designed as a financial adjustment rather than a direct ban; its effect could still function as a de facto restriction on trade, particularly for low-low income countries lacking the infrastructure to measure and report emissions accurately, and many exporters will face a high compliance cost, which may deter market access.

To illustrate this principle, the case *India – Quantitative Restrictions on Imports (1997, DS90)*, India[23] maintained import restrictions on agricultural and industrial products, arguing they were necessary for the balance of payments (BOP) under GATT Article XVIII: B. The WTO Panel, however, ruled that India's restrictions violated Article XI:1 because they were not justified under BOP exceptions. Consequently, any measure that restricts import quantities- whether quotas, licensing, or other non-tariff barriers- falls under Article XI. Almost predictably, the EU may argue for CBAM being a price-based measure; however, if it effectively limits market access, it can be classified as an illegal restriction.

The India- Quantitative Restrictions on Imports Case was selected as it provides a textbook application of GATT Article XI, showing how a broad import restriction (over 2,700 product lines) was found to be a quantitative restriction violating WTO rules. The import of this is that a policy can function as an illegal barrier even if not a classic tariff.

Furthermore, in this case, India unsuccessfully attempted to justify its measures as necessary for balance-of-payments reasons (under Article XVIII). This demonstrates the high legal burden for invoking WTO exceptions. Therefore, while general exceptions like GATT Article XX exist for policy goals such as environmental protection, they are extremely difficult to satisfy.

The ATAF analysis[24] shows that exposure to the CBAM varies significantly across African countries depending on their export structure, energy mix and industrial profile. Some economies face immediate risks due to their dependence on carbon-intensive exports to the EU, while others may see growing exposure as the scope of the mechanism expands to additional sectors in the coming years.

Countries such as Mozambique, South Africa, Morocco and Egypt already face notable exposure through exports of aluminium, steel and fertilisers. Other issues arising could be administrative burdens. This is because CBAM requires importers to register with EU authorities, submit annual reports, and purchase certificates at fluctuating ETS-linked prices.[25]

- **Relation to climate equity**

The ***US- Shrimp- Turtle case***,[26] allowed restrictions on trade for environmental goals to be applied fairly. The EU may argue that CBAM is justified under Article XX(g) for measures relating to conservation

[23]WTO Panel Report, India — Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, WT/DS90/R, adopted 22 September 1999.
[24]'ATAF Releases Technical Note on EU Carbon Border Adjustment Mechanism and Implications for African Exports - ATAF' (ATAF15 March 2026) https://ataftax.org/news/ataf-releases-technical-note-on-eu-carbon-border-adjustment-mechanism-and-implications-for-african-exports/ accessed 17 March 2026.
[25]Akin Gump CBAM Alert.
[26]WTO Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R.

of exhaustible natural resources, as well as Article XX(b) for measures necessary to protect human, animal, or plant life or health. However, for this, CBAM must pass the "necessity test". The ***US-Gasoline case*** established that Article XX (d) of the GATT allows members to justify their trade-restrictive measures.[27]

However, the measures should satisfy the conditions of necessity and non-discrimination, considering the chapeau. The requirement of necessity was established in the ***Brazil - Retreaded Tyres case***, where the Appellate Body stated that a member should demonstrate two things: first, that the measures contribute to the policy objective, and second, that there are no less trade restrictive alternatives that are reasonably available.[28]

Pursuant to the chapeau to Article XX, measures undertaken by a member should not be applied in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail. This position was affirmed in the ***Korea -Various Measures on Beef case***.[29] The argument proffered, therefore, is that even if the EU argues that the measures are non-discriminatory due to uniform application, other considerations have not been put on the table, such as CBDR on historical emissions and current capabilities.

iv. Predictability and Transparency in Trade Measures

Transparency and predictability of regulations and procedures at borders are widely recognized as an essential element of trade facilitation.[30] They are the starting point for ensuring the efficiency and, ultimately, the stability of a rules-based environment for goods crossing the border, enabling traders to fully understand the conditions for and constraints on imports, exports, and transit operations, and to gain an accurate picture of possible costs. Predictability in the application of regulations and procedures is also important because uncertainty regarding possible time delays in procedures is interpreted as a concealed cost for business and may be a major obstacle to smooth transactions.[31]

To try and achieve this, the EU provided for a transition period between 2023 and 2025, while CBAM became fully operational on 1 January 2026. The CBAM will initially apply to imports of certain goods and selected precursors whose production is carbon-intensive and at the highest risk of carbon leakage: cement, iron and steel, aluminium, fertilizers, electricity, and hydrogen. With this enlarged scope, CBAM will eventually, when fully phased in, capture more than 50% of the emissions in ETS-covered sectors. The objective of the transitional period is to serve as a pilot and learning period for all stakeholders (importers, producers, and authorities) and to collect useful information on embedded emissions to refine the methodology for the definitive period.[32]

The main concern with this is the dynamic of CBAM expansion, such as the potential inclusion of chemicals and plastics, which would create regulatory uncertainty. These

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[27]WTO Appellate Body Report, United States – Gasoline, paras. 30 – 31.
[28]AWTO Appellate Body Report, Brazil – Retreaded Tyres, para. 139.
[29]WTO Appellate Body Report, Korea – Various Measures on Beef, paras. 183 – 184.
[30]The WTO Glossary defines transparency as the "Degree to which trade policies and practices, and the process by which they are established, are open and predictable". The concepts of transparency and predictability are always associated with each other.
[31]World Customs Organisation, WCO Transparency and Predictability Guidelines, 2016.
[32]Carbon Trust, CBAM for Business.'

uncertainties often arise in emerging markets due to rapidly changing laws, inconsistent enforcement, and political instability, making it challenging for investors to assess risks and opportunities accurately. They can have severe implications for businesses. Importers and exporters will potentially face unpredictable regulatory environments; therefore, businesses will slow down, investments will be limited, and ultimately, reduce economic development.[33] CBAM introduces a recurring and potentially volatile cost, linked to carbon prices. Companies that rely on default values or poor-quality data may face higher costs than necessary, eroding competitiveness.[34]

International Environmental/Climate Law

i. Common but differentiated responsibilities principle

This principle finds its grounding in international law vide article 3 (1) of the UNFCCC, to which Kenya and many other developing nations in Africa are parties. CBDR has two normative components. "Common responsibilities" suggests that the risks associated with climate change affect every person and nation in the world.[35] As a result, all countries share the responsibility to "cooperate in good faith and in a spirit of partnership."[36] "Differentiated responsibilities" indicates that shared responsibility must be differentiated between countries based on two factors: historical responsibility for current environmental degradation, and the capability to address the problem.[37] Both factors require developed countries to "take the lead in combating climate change and the adverse effects thereof." In a nutshell, this principle recognizes the historical, and current disparities in the contribution to climate change and emphasizes the need for developed countries to take the lead in combating climate change, while acknowledging the economic capabilities of developing states in doing so.

Addressing climate change requires consideration of two interrelated concerns: The first being reducing global carbon emissions, and the second is meeting the developmental needs of developing countries.[38] Although the CBAM might potentially address the former, it shall inadvertently undermine the latter. A uniform CBAM would unilaterally impose the implementing country's carbon policy on developing countries' exporters and thus equalise emission reduction commitments across the world, pushing for equal rather than differentiated responsibilities. To comply with CBDR, CBAM must apply differently between developed and developing countries, either by setting a lower rate or price for the latter or by fully exempting them.

According to the UNCTAD Report of 2021, the principle behind these mechanisms such as CBAM is to impose on developing countries the environmental standards that developed countries are choosing. This goes against the principle of common but

[33]'The ESG Institute' (The ESG Institute26 December 2025) <https://www.the-esg-institute.org/blog/trading-with-the-eu-under-cbam-implications-for-importers-and-exporters> accessed 6 February 2026.
[34]'The ESG Institute' (The ESG Institute26 December 2025) https://www.the-esg-institute.org/blog/trading-with-the-eu-under-cbam-implications-for-importers-and-exporters accessed 6 February 2026.
[35]Stone C, 'Common but Differentiated Responsibilities in International Law' (2004) 98(2) American Journal of International Law 276, at 276, n 2.
[36]Ivan Ozai, 'Designing an Equitable Border Carbon Adjustment Mechanism' (2022) Canadian tax journal / revue fiscale canadienne 70:1, 1-33.
[37]Bell D, 'Global Climate Justice, Historic Emissions, and Excusable Ignorance' (2011) 94:3 Monist 391-411, at 391, pointing out that the differentiation component of CBDR is based on both historical emissions and ability to pay. (hereinafter *Bell. Global Climate Justice.*)
[38]Bell, 'Global Climate Justice.'

differentiated responsibility enshrined in the Paris Agreement.[39] Moreover, attempts to liberalise trade in areas of export interests to the developed world, and relying on actions like CBAM, can only undermine the ability of developing countries to use trade as a means of development.[40] Therefore, the implementation of the CBAM places undue burdens on developing states like Mozambique and Ghana which lack the economic resources to swiftly transition to low-carbon economies.[41]

The same report states that "with a CBAM based on a carbon price of $44 per tonne, the income of developed countries would rise by $2.5 billion, while that of developing nations would fall by $5.9 billion". Further, according to the UNCTAD report,[42] "the CBAM would generate a similar gap between developing and developed countries in terms of welfare. In both cases, developed countries would fare better than developing ones."

Aman Anand,[43] argues that CBAM allows the EU to shift focus from its historical responsibilities, given that the EU and developed nations have been major contributors to global greenhouse gas emissions due to fossil fuel reliance. The CBDR-RC principle expects them to lead climate action and support developing countries. The EU frames ETS and, in extension, CBAM as a cornerstone of its climate policy, aligning it with the Paris Agreement's goals of limiting global warming.[44] By doing so, it positions CBAM as a mechanism to promote global decarbonization. In agreeing with those sentiments, this framing effectively externalizes the costs of the EU's climate ambition, penalising exporters from developing countries that rely on energy-intensive industries for economic development. It imposes EU-specific carbon standards, undermining nations' sovereign contributions and the differentiated approach of NDCs in the Paris Agreement, pressuring them to prioritise EU standards.

▪ The case for climate finance and technology transfer

Climate finance has been defined as local, national or transnational financing, drawn from public, private and alternative sources of financing, that seeks to support mitigation and adaptation actions that will address climate change.[45] This recognizes that the contribution of countries to climate change and their capacity to prevent it and cope with its consequences vary enormously. Climate finance is needed for mitigation because large-scale investments are required to significantly reduce emissions. Climate finance is equally important for adaptation, as significant financial resources are needed to adapt to the adverse effects and reduce the impacts of a changing climate.

Article 9 of the Paris Agreement states that Developed Country Parties shall

[39]Article 2, Paris Agreement
[40]UNCTAD's Trade and Development Report (TDR) 2021.
[41]David Luke, 'The EU's Landmark Carbon Tool Presents Major Catch-22 for Africa | African Arguments' (African Arguments15 June 2023) https://africanarguments.org/2023/06/the-eu-landmark-carbon-tool-cbam-catch-22-for-africa/ accessed 6 February 2026.
[42]UNCTAD's Trade and Development Report (TDR) 2021.
[43]In Aman Anand, 'The Case for Climate Equity – Analysing Carbon Border Adjustment Mechanism in Light of CBDR-RC Principle' (Jindal Forum for International and Economic Laws 21 February 2025) https://jindalforinteconlaws.in/2025/02/21/the-case-for-climate-equity-analysing-carbon-border-adjustment-mechanism-in-light-of-cbdr-rc-principle/ accessed 17 May 2025. (hereinafter Anand, 'Case for Climate Equity.'
[44]European Commission, 'Carbon Border Adjustment Mechanism' (European Commission2025) https://taxation-customs.ec.europa.eu/carbon-border-adjustment-mechanism_en
[45]See the definition in United Nations Climate Change.

provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention.[46] Further, Article 4(3) of the UNFCCC[47] complements the Paris Agreement in that it also highlights the obligation of developed nations to offer financial resources to developing nations to support their climate actions, both for mitigation and adaptation to climate change.

Middle-income, lower-middle-income, and least developed countries have scarce resources, inadequate infrastructure, and socio-economic disparities that exacerbate their efforts to develop effective strategies to combat climate change. They have consistently emphasized the need for the international community to acknowledge her unique circumstances, and provide financial aid, technology transfer, and offer capacity building programs. CBAM imposes additional costs on imports from developing countries and places a strain on the already scarce resources, which could be used in climate mitigation and adaptation strategies, as part of climate finance.

I. Carbon Border Adjustment Mechanism (CBAM) & the private sector in Kenya

According to a study done by the Delegation of German Industry and Commerce for Eastern Africa, the CBAM is poised to significantly impact African economies, particularly those reliant on exporting carbon-intensive goods like fertilizer, iron, steel, aluminium, and cement to the EU.[48] The mechanism, as noted earlier, introduces a carbon tax on imported goods based on their carbon emissions during production, which will create challenges for exporters in Africa, given the higher carbon intensity of their production processes compared to European counterparts. For example, exports of aluminium could see a reduction of up to 13.9%, iron and steel by 8.2%, fertilizer by 3.9%, and cement by 3.1%, as reported by various studies.[49]

The carbon intensity of these sectors in Africa is often higher due to the reliance on less efficient production technologies,[50] and in some cases, outdated infrastructure. This difference in emissions could mean that African exports become less competitive, leading to potential declines in market share in the EU. However, the shift may not be entirely negative as some of these exports could be redirected to other markets, including China and India.[51]

The AHK Eastern Africa study,[52] "Gearing Up: CBAM Readiness of Kenya's Industry," identifies cement, steel, and energy as key sectors likely to be affected by CBAM. While specific carbon intensity figures (emissions per unit of output) are not provided in the study, it indicates that:

i. Economic impacts on these sectors are anticipated;
ii. The study evaluates existing and planned CO_2 emissions recording practices; and

[46]Article 9, Paris Agreement.
[47]Article 4(3), UNFCCC.
[48]'New Study: Exploring the Impact of the EU's Carbon Border Adjustment Mechanism (CBAM) on Kenya's Key Sectors' (Kenia.ahk.de12 June 2024) https://kenia.ahk.de/en/news/new-study-exploring-the-impact-of-the-eu-s-carbon-border-adjustment-mechanism-cbam-on-kenya-s-key-sectors
[49]UNCTAD. (2024, February 27). EU should consider trade impacts of new climate change mechanism. United Nations Conference on Trade and Development. Retrieved May 24th, 2025, from https://unctad.org/news/eu-should-consider-trade-impacts-new-climate-change-mechanism .(hereinafter UNCTAD News, 'Trade Impacts.')
[50]See Kwakwa PA (2026), "Carbon dioxide emissions reduction strategies in Kenya: the synergy between renewable energy, technical cooperation grants and the manufacturing industry". Technological Sustainability, Vol. 5 No. 1 pp. 20–42, doi: https://doi.org/10.1108/TECHS-06-2025-0139
[51]UNCTAD News, 'Trade Impacts.'
[52]Ibid, note 48.

iii. Recommendations are provided for enhancing CBAM compliance.

The Kenya Private Sector Alliance (KEPSA) previously specifically identified horticulture as a sector that will be negatively impacted by CBAM and similar carbon adjustment measures. According to the KEPSA memorandum, Kenya's share of global greenhouse gas emissions is 0.15 per cent. Nonetheless, measures such as requirements for zero targets for individual companies, and international and local regulations on low carbon climate resilient development such as cross-border adjustment mechanisms (CBAM), will negatively impact Kenyan exports.[53] The concern is that Kenyan products will become less globally competitive as trading partners implement carbon adjustment measures. KEPSA further states that these measures are gradually becoming tariff and non-tariff barriers to trade and lastly that there is a risk that Kenyan exports could be shunned in certain regional trading blocs and markets.

Furthermore, some African countries are particularly vulnerable, with the World Bank's "Aggregate Relative CBAM Exposure Index" ranking Zimbabwe as the most exposed, followed by Mozambique and Egypt.[54] Despite these challenges, there is potential for increased agricultural exports to the EU as African countries adjust their relative comparative advantage in response to the CBAM.[55]

The study also identified Agriculture, Manufacturing, Fertilizers, and Energy as the key sectors likely to be affected by CBAM.[56] Comparatively, tea and coffee production are projected to face considerable challenges if the CBAM is expanded due to its substantial export volumes. It further notes that Manufacturing, another critical area of concern, which includes industries such as cement, steel, and hydrogen production, is expected to be notably affected due to its high carbon emissions. This necessitates immediate attention to sustainability measures, given the potential financial implications of CBAM. Additionally, the findings of the study indicate that the fertilizer industry and energy sector will experience impacts due to their essential roles in agricultural productivity and industrial processes, with the interplay between energy consumption and emissions.

Consequently, there are two key barriers to CBAM compliance. The first is financial constraints, as the high costs associated with upgrading emissions tracking systems and adopting cleaner production technologies pose significant challenges. Many companies, especially SMEs, operate on tight margins and may find it difficult to invest in the necessary upgrades for compliance with the CBAM. The second barrier is the absence of standardized guidelines for emissions reporting, and insufficient regulatory support makes it challenging for companies to align their practices with international standards. This gap in policy enforcement also hinders the adoption of consistent carbon accounting practices across the private sector.

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[53] Fred Obura, 'The Kenyan Wallstreet' (*The Kenyan Wallstreet* 23 August 2023) <https://kenyanwallstreet.com/carbon-trading-kepsa-pushes-for-predictable-regulatory-framework> accessed 17 March 2026.

[54] UNCTAD News, 'Trade Impacts.'

[55] World Bank Group. (2023, June 15). Relative CBAM Exposure Index. Retrieved May 24th, 2025, from https://www.worldbank.org/en/data/interactive/2023/06/15/relaMtive-cbam-exposure-index#4

[56] 'New Study: Exploring the Impact of the EU's Carbon Border Adjustment Mechanism (CBAM) on Kenya's Key Sectors' (Kenia.ahk.de 12 June 2024) https://kenia.ahk.de/en/news/new-study-exploring-the-impact-of-the-eu-s-carbon-border-adjustment-mechanism-cbam-on-kenya-s-key-sectors

Potential solutions and recommendations

I. Considering region-specific tariffs and benchmarks

One of the major concerns with CBAM is its uniform application. The EU could consider sectoral realities and developing nations' Nationally Determined Contributions (NDC) progress. Benchmarks could be set based on the carbon intensity of production in specific sectors, local energy sources, economic development levels, and infrastructure.[57] Countries with high renewable energy shares could have lower benchmarks. Adjusting benchmarks according to each country's NDC progress could incentivize compliance. Bilateral agreements between the EU and developing nations on emissions reductions could also encourage cooperation.

ii. Differentiated application based on development status

A potential violation of CBDR has been identified above. To promote fairness and equity, a differentiated approach based on countries' levels of development should be adopted. Specifically, the EU should consider implementing graduated carbon pricing tiers that correspond to each country's GDP per capita and historical responsibility for emissions. This approach reflects the CBDR-RC principle. By aligning CBAM charges with a country's economic capacity and historical contribution to climate change, the EU can ensure that the burden of carbon pricing does not unfairly penalize developing countries, many of which have contributed the least to global greenhouse gas emissions but are often the most vulnerable to climate impacts.

In addition, the EU could consider granting Least Developed Countries (LDCs) a full exemption from CBAM obligations during a transitional period of 10 to 15 years. Currently, CBAM's transition period is just 2 years, and many countries may not have made the requisite adjustment due to other pressing concerns. This grace period would provide LDCs with the necessary time and policy space to pursue low-carbon industrialization pathways without facing prohibitive trade barriers.

iii. Technical capacity building

The CBAM is expected to generate more than US $9 billion a year in revenues from all targeted sectors by 2030. Part of that money will go into the coffers of EU member states, while part will be redistributed to low-income EU trading partners to incentivize decarbonization initiatives.[58]
To ensure it operates in a manner that is both equitable and supportive of global climate goals, the EU should establish a CBAM Technical Assistance Fund, financed through revenues generated from the CBAM itself. This fund would serve as a dedicated instrument to assist developing countries, particularly those with limited capacity, in meeting the technical and institutional demands imposed by the mechanism, such as developing efficient and sufficient monitoring systems. By reinvesting CBAM revenues into developmental support, the EU would demonstrate a commitment to climate justice, capacity building, and inclusive global participation in the transition to a low-carbon economy.

[57] Anand, 'Case for Climate Equity.'
[58] 'Playing by New Rules: How the CBAM Will Change the World' (www.woodmac.com21 September 2023) https://www.woodmac.com/horizons/how-the-cbam-will-change-the-world/ .

iv. Formation of coalitions

Developing nations and other aggrieved parties can form coalitions, or use their existing ones, such as SADC, COMESA & the EAC, to negotiate CBAM exceptions at the WTO, and also demand technical and financial support as part of climate equity. Fortunately for Africa, we are currently pushing for the success of the African Continental Free Trade Area (AfCFTA), poised as the World's Largest free trade area. This can also be used as an avenue to advocate for free markets and also have great bargaining power with the EU.

v. Use a global governance perspective

According to D. Ravi Kanth, the expanded BRICS leaders meeting in Kazan, Russia, on 23 October rejected unilateral, punitive, and discriminatory protectionist measures presented as environmental policies, including carbon-border adjustment mechanisms (CBAMs). They argued that such measures must comply with international law and should not be used to justify discriminatory trade restrictions. It thus should be aligned with multilateral frameworks under the UNFCCC, rather than implemented solely through unilateral regional measures. In particular, the international community should prioritize the establishment of global carbon price floors through coordinated platforms such as the International Monetary Fund (IMF) or the World Bank. These institutions are comparatively more sensitive to countries' development stages, economic capabilities, and existing climate commitments compared to regional blocs.

Conclusion

This paper has demonstrated that the EU's CBAM is an intersection of climate policy and international trade law. While the ambition to combat carbon leakage is timely and commendable, its current structure risks undermining the very principles of equity and cooperation it seeks to address. The analysis above has used the various principles of international trade and climate law to show the tensions that CBAM raises, and the vulnerabilities and concerns for LDCs. We are in a new dispensation, where unilateral decisions have the potential of affecting millions across the world. CBAM thus needs to be readjusted, with equitable burden sharing and cooperation, towards a just transition. While the success of CBAM may be measured by the number of billions collected yearly or through the tonnes of CO^2 adjusted at borders, the real question is whether it fosters an equitable trade-climate regime. As now demonstrated by CBAM, climate and trade are incongruent- they will either slap each other- and one beats the other to death, or countries can choose to reconcile climate ambition with equity in global trade.

Climate equity recognises that while climate change is a global crisis, its causes, impacts and the capacity to respond are profoundly unequal. A just transition must ensure that those who contributed least to the crisis are not asked to bear its greatest costs.

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A debt the state won't pay: Twelve years inside Kenya's broken wildlife compensation law

By Ian P. Kerina Mochama

Abstract

Kenya's Wildlife Conservation and Management Act, 2013 promises compensation to citizens who lose life, limb, crops, or livestock to wildlife the state has chosen to protect. Twelve years on, that promise is failing in ways that go well beyond ordinary bureaucratic delay. This paper identifies three compounding defects that, together, make non-payment close to structurally inevitable. First, section 25(5) permits compensation to be denied where a claimant's land use is incompatible with the ecosystem-based management plan for the area a plan that, under section 19(e), only Kenya Wildlife Service itself is empowered to produce and which this paper finds no evidence has ever actually been produced for the community land where most human-wildlife conflict occurs. Second, the insurance scheme that section 24(b) required as a funding pillar for the compensation fund remains, twelve years later, at the pilot stage, leaving the fund almost entirely dependent on annual budget allocation. Third, a November 2025 amendment restructured county compensation committees, removing standing land-use and environmental expertise and capping their meetings at four per year, precisely as a documented Sh3.5 billion payment backlog reached Parliament's own Public Accounts Committee. Drawing on five High Court judicial review including one brought by a child through her father merely to compel payment of an already-approved award this paper argues that Kenya's wildlife compensation regime has evolved a structure that approves claims on paper while resisting their payment in practice and proposes specific, achievable statutory and regulatory fixes to close that gap.

Keywords: *wildlife compensation · human-wildlife conflict · Wildlife Conservation and Management Act · administrative law · ecosystem-based management plan · Kenya Wildlife Service · fair administrative action · statutory gap*

1. Introduction

Deni halilali translated into English is a debt that does not sleep. It is one of the oldest sayings in Kiswahili and it means what it says a debt owed is a debt that remains, restless, until someone finally pays it. Kenya's wildlife compensation law seems to have found a way around this. It has built a debt that Parliament wrote into statute, that a government committee formally approved, that a court has now confirmed in writing and that has simply gone on sleeping for years, undisturbed, while the person it belongs to waits.

In January 2019, a girl went to fetch water from the River Miriu, near Chuowe beach in Homa Bay County, when a hippopotamus attacked her.[1] She survived, grievously injured. Her father did everything Kenyan law asks a victim's family to do: he reported the attack to police, he filed a compensation claim with the Kenya Wildlife Service and he waited.[2] The claim was reviewed, verified and approved for three million shillings, the statutory ceiling for a permanent disability caused by wildlife.[3] Seven years after the attack, the High Court itself put what happened next as plainly as a court can; it was common ground that her claim had been duly processed but they were yet to be paid six years down the line.[4] A child had to sue the Kenya Wildlife Service through her own father, because she was still too young to sue in her own name for a judicial review order compelling the government to hand over money it had already agreed on paper was hers.[5]

She is not an outlier. She is one name in a list that keeps growing. Since July 2024, at least five Kenyans whose full case files this paper has read among them a man mauled by a hyena,[6] the family of a man killed by a buffalo,[7] a man attacked by an elephant[8] and this one child has had to drag Kenya Wildlife Service to the High Court not to argue about how much they are owed, but simply to make the government decide, or pay, at all. This points to at least nine more cases following the identical pattern. Ask yourself what kind of law produces that pattern. Not a law with no compensation scheme Kenya has one, with a name, a budget line and a set of committees stretching into every county.[9] Not a law with no victims willing to come forward; the courts are, quite literally, full of them. What Kenya has is a compensation law that was built, twelve years ago, with cracks in its foundation wide enough to swallow a child's disability award for six years running and in November 2025, instead of repairing those cracks, Parliament quietly made two of them wider.[10]

This is the story of how that happened, what the law promises, what it has actually built to deliver on that promise, precisely where the machinery breaks down and what it would take realistically, not rhetorically to fix it.

2. Legal and institutional framework

Read only the statute and Kenya's wildlife compensation regime looks, if anything, ahead of its time.

Section 24 establishes a dedicated Wildlife Compensation Scheme, funded three ways: through money Parliament specifically

[1] *Republic v Kenya Wildlife Service & 2 others; COT (A minor Suing Through Her Father and Next Friend BO) (Ex parte Applicant)* (Judicial Review Miscellaneous Application E001 of 2025) [2026] KEHC 1445 (KLR) (6 February 2026).
[2] *Republic v Kenya Wildlife Service & 2 others; COT (A minor Suing Through Her Father and Next Friend BO) (Ex parte Applicant)* (Judicial Review Miscellaneous Application E001 of 2025) [2026] KEHC 1445 (KLR) (6 February 2026).
[3] *Republic v Kenya Wildlife Service & 2 others; COT (A minor Suing Through Her Father and Next Friend BO) (Ex parte Applicant)* (Judicial Review Miscellaneous Application E001 of 2025) [2026] KEHC 1445 (KLR) (6 February 2026); Wildlife Conservation and Management Act 2013, s 25(3)(b).
[4] *Republic v Kenya Wildlife Service & 2 others; COT (A minor Suing Through Her Father and Next Friend BO) (Ex parte Applicant)* (Judicial Review Miscellaneous Application E001 of 2025) [2026] KEHC 1445 (KLR) (6 February 2026).
[5] ibid.
[6] *Republic v Kenya Wildlife Service & 2 others; Muhia (Ex parte Applicant)* (Judicial Review Application E003 of 2024) [2024] KEHC 8086 (KLR) (4 July 2024).
[7] *Republic v Kenya Wildlife Service & 2 others; Gufu & another (Ex parte Applicants, suing as legal representatives of the Estate of Hassan Kuno Jala (Deceased))* (Miscellaneous Judicial Review E018 of 2025) [2026] KEHC 3179 (KLR) (11 March 2026).
[8] *Republic v Kenya Wildlife Service & 2 others; Fugicha (Ex parte Applicant)* (Miscellaneous Judicial Review E016 of 2025) [2026] KEHC 3150 (KLR) (11 March 2026).
[9] Wildlife Conservation and Management Act 2013, s 24 (establishing the Wildlife Compensation Scheme).
[10] Wildlife Conservation and Management Act 2013, s 18, as amended by the Wildlife Conservation and Management (Amendment) Act 2025 (Act No. 24 of 2025).

budgets for it, through an insurance scheme to be established by the Cabinet Secretary responsible for matters relating to finance and through any other source the government chooses to add.[11] That is not the language of an afterthought. It is the language of a state trying to build something that survives a bad budget year, a scheme that does not have to compete, every twelve months, with roads and hospitals for the same shrinking pot of money.

The law also builds a bureaucracy to match the ambition. Every county must have its own Wildlife Conservation Committee, tasked with a wide range of statutory functions such as implementing wildlife user rights, distributing conservation benefits fairly, bringing together the people who actually live alongside wildlife, developing mechanisms to reduce human-wildlife conflict before it happens and crucially for what follows reviewing ecosystem based management plans produced by the Service and recommending compensation payments for the claims that reach it.[12] Kenya Wildlife Service itself sits inside this structure twice over once as secretary to every county committee and once as the body Parliament expected to actually write the ecosystem-based management plans those same committees would later be asked to apply.[13]

Then there are the numbers and they are not stingy. Lose a life to an elephant, a lion, a buffalo, a hippopotamus, or any of the other species Parliament has designated as dangerous and the law promises five million shillings to your family.[14] Suffer a permanent disability and the ceiling is three million.[15] Any other injury draws up to two million, scaled to its severity.[16] For crops, livestock, or property destroyed by wildlife, the promise is not even a fixed sum, it is full market-rate compensation, whatever the loss is actually worth, assessed and paid at the price of the day.[17] Dissatisfied with what a committee decides? The law gives thirty days to appeal to the National Environment Tribunal, with a further right of appeal from there to the Environment and Land Court.[18] And if anyone is tempted to think this generosity is naive, the law closes that door too; filing a false claim is a criminal offence, punishable by fine or imprisonment.[19]

Read in isolation, this is not a law that forgot its victims. It is a law that appears to have thought about almost everything: funding resilience, local participation, technical review, meaningful sums of money, a route of appeal and a deterrent against abuse. So why, twelve years later, is a child suing for money the state had already agreed was hers?[20]

3. Identifying the gap

3.1 The undefined exclusion

Look closely enough at any promise and you will usually find the fine print where

[11]Wildlife Conservation and Management Act 2013, s 24.
[12]Wildlife Conservation and Management Act 2013, s 19(a)–(k), especially s 19(e) and s 19(i).
[13]Wildlife Conservation and Management Act 2013, s 19(e) (Service to produce ecosystem-based management plans for committee review) and s 18(1)(b) (Service officer as committee secretary).
[14]Wildlife Conservation and Management Act 2013, s 25(3)(a).
[15]Wildlife Conservation and Management Act 2013, s 25(3)(b).
[16]Wildlife Conservation and Management Act 2013, s 25(3)(c).
[17]Wildlife Conservation and Management Act 2013, s 25(4)– (5).
[18]Wildlife Conservation and Management Act 2013, s 25(6).
[19]Wildlife Conservation and Management Act 2013, s 100.
[20]*COT* (n 1).

it quietly takes itself back. Kenya's wildlife compensation law has its fine print in a single provision, tucked into section 25(5), governing every claim for crops, livestock and property lost to wildlife compensation shall not be paid where the owner… failed to take reasonable measures to protect such crops, livestock or property from damage by wildlife or his land use practices are incompatible with the ecosystem-based management plan for the area.[21]

On its face, this sounds like ordinary common sense, the kind of clause an insurer might write to stop people claiming for damage they invited. Regulations issued in 2017 even give the first half of that sentence real content a committee may examine whether a claimant followed generally reasonable agricultural practices or livestock control and may refuse a claim where a crop or animal was in the committee's own opinion, deliberately used as a lure crop or for intercept feeding to draw wildlife in.[22] Reasonable people can argue about how that discretion is used, but at least it has been given some shape.

The second half of that same sentence has no shape at all. Ask a simple question: where, exactly, does a farmer in Kajiado or a herder in Samburu go to find out whether their land use is compatible with the ecosystem-based management plan for the area? This paper has read the 2017 Compensation Regulations from beginning to end and the phrase ecosystem-based management plan does not appear even once.[23] The Act's own interpretation section does not define it either.[24] A legal precondition for getting paid exists that no regulation explains, no form asks about and no published guidance interprets.

So, who was supposed to write this plan in the first place? The Act answers that question and the answer makes the gap worse, not better. Section 19(e) assigns county committees the job of reviewing ecosystem-based management plans but only after they have been produced by the Service.[25] Kenya Wildlife Service, not the community, not the county, not the claimant, is the party the law expects to actually write these plans. Yet the Service's own management-planning obligations under the Act run to a narrower category of land altogether section 44 requires management plans for every national park, marine protected area, wildlife conservancy and sanctuary the formally gazetted protected areas themselves.[26] It says nothing about the ordinary farms, grazing land and homesteads bordering those protected areas, which is precisely where an elephant leaves a park to raid a maize field, or a lion follows goats onto community land.

Picture, then, the actual position of a claimant. Section 25(5) makes compensation conditional on a plan they have never seen, covering land that may never have been required to have one, written by an agency that has never demonstrably written it. It is not a high bar to clear. It is not a low bar either. It is not a

[21]Wildlife Conservation and Management Act 2013, s 25(5).
[22]Wildlife Conservation and Management (Compensation) Regulations 2017 (Legal Notice 245 of 2017), regulation 13, 14, 30(3).
[23]Wildlife Conservation and Management (Compensation) Regulations 2017, full text.
[24]Wildlife Conservation and Management Act 2013, s 3 (interpretation).
[25]Wildlife Conservation and Management Act 2013, s 19(e).
[26]Wildlife Conservation and Management Act 2013, s 44.
[27]Joseph M Mukeka, Joseph O Ogutu, Erustus Kanga and Eivin Røskaft, 'Trends in Compensation for Human-Wildlife Conflict Losses in Kenya' (2019) 11(3) International Journal of Biodiversity and Conservation https://academicjournals.org/journal/IJBC/article-full-text/F39C25A60631; Wildlife (Conservation and Management) Act, Chapter 376 (repealed).

bar at all it is a door with no keyhole, and a committee that can point to it whenever it likes.

3.2 The weakened gate keeper

Wildlife compensation in Kenya is not a 2013 invention. Sources differ slightly on exactly when it began: a peer-reviewed study traces it to 1976, under the Wildlife (Conservation and Management) Act, Chapter 376, which paid a family a flat 30,000 shillings for a death and 15,000 shillings for an injury, while crops and livestock were compensated at market value;[27] the government's own 2020 taskforce report instead dates the scheme to 1979, under the then Natural Policy programme.[28] What both sources agree on is the substance: even those modest sums proved too much for the state to sustain. An amendment dated to 1989 by the academic study and to 1990 by the government's own taskforce suspended compensation for every kind of loss except human death and injury, cutting property, crop and livestock claimants out of the scheme entirely, while what remained of the payment process was, in the words of the academic study, both too meagre and "too slow and cumbersome."[29] A further amendment in 2006 raised the death and injury figures to 200,000 and 50,000 shillings respectively still a fraction of what today's law would eventually promise.[30] When the current Act finally came into force on 10 January 2014, it did two things at once: it reinstated compensation for the property, crop and livestock losses that had been cut out of the law twenty-five years earlier and it raised every figure by orders of magnitude.[31] And in the decade immediately preceding that reform, one peer-reviewed nationwide study found that the Kenyan government compensated only about 30% of all claims filed across the entire country.[32]

So, the pattern this paper documents did not begin with the 2025 amendment, or even with the 2013 Act. Read that history again: meagre payments, a partial retreat from the state's own promises and a compensation process repeatedly described by its own researchers, not just its critics as too slow and too cumbersome to work. Given that inheritance, a country rebuilding this scheme in 2013 might have been expected to insulate its decision-making committees from exactly the kind of drift that had already narrowed the scheme once before to make them more technically capable, not less and more able to sit and clear a backlog, not less. Instead, in November 2025, the opposite happened.

The original 2013 committee was built, at least on paper, as a genuine cross-section of expertise. Its statutory membership included a chairperson appointed through a competitive process requiring at least five years of relevant experience, alongside a land use planning officer, a county environment officer, an agricultural officer, a livestock officer, a medical officer, a police officer in-charge, a representative of county government, and four community nominees.[33] Whatever else could be said of it, this was a committee that at least had, on its books, someone whose actual

[28]Ministry of Tourism and Wildlife, Report of the Task Force on Human-Wildlife Conflict Compensation Schemes in Kenya (Final Report, July 2020) 4 https://www.tourism.go.ke/wp-content/uploads/2020/07/Task-Force-on-Human-Wildlife-Conflict-Compesation-Schemes-Final-Report.pdf.

[29]Mukeka and others (n 29), citing I Sindiga, 'Wildlife Based Tourism in Kenya: Land Use Conflicts and Government Compensation Policies over Protected Areas' (1995) 6(2) Journal of Tourism Studies 45; Taskforce Report (dating the suspension to 1990 rather than 1989).

[30]Mukeka and others (n 29).

[31]ibid; Wildlife Conservation and Management Act 2013 (commencement 10 January 2014) https://new.kenyalaw.org/akn/ke/act/2013/47/eng@2025-11-04.

[32]Mukeka and others (n 29).

[33]Wildlife Conservation and Management Act 2013, s 18 (original 2013 text) https://new.kenyalaw.org/akn/ke/act/2013/47/eng@2014-01-03.

job was land-use planning and someone whose actual job was environmental management precisely the expertise a claim about "ecosystem-based management plan" compatibility would seem to require.

In practice, this is not quite how the committee had come to operate even before the law caught up with it. Kenya Wildlife Service's own public statements, in at least two separate reports describing compensation payment ceremonies, already described the chairperson as, simply, "the County Commissioner" a national government administrative officer, not a competitively-selected wildlife specialist.[34] So when the Wildlife Conservation and Management (Amendment) Act, 2025 formally rewrote section 18 to name the County Commissioner as chair,[35] it was, on this point, largely catching the statute up to a practice that appears to have existed for years. That is worth saying plainly, because overstating it would be its own kind of inaccuracy.

What the 2025 amendment cannot be credited with merely formalizing, however, is what it removed. The land use planning officer is gone from the committee's membership. The county environment officer is gone. The representative of the county government and the police officer in-charge are gone too.[36] What remains, alongside the County Commissioner and the community nominees, is an agricultural officer, a medical officer, a livestock officer and the Service officer who acts as secretary to useful people, in their own domains, none of whom has land-use planning or environmental management as their actual job.[37] And in the same amendment, Parliament added something the original 2013 Act never contained at all: a cap limiting these committees to a maximum of four meetings per financial year, absent special dispensation from the Cabinet Secretary.[38]

Set against what the government's own considered advice had already recommended, this 2025 tinkering looks smaller still. The 2020 Taskforce did not propose adjusting the committee's membership. It proposed abolishing the committee outright. Its final report's list of recommended amendments to the Act states, without qualification "the proposal is that the CWCC be scrapped off in totality."[39] In its place, the Taskforce proposed a different architecture entirely a national Directorate of Community Wildlife Service to set policy, a County Insurance Representative to administer claims at county level and the pay-or-reject decision on every claim resting with a licensed insurance company bound by ordinary insurance-regulatory oversight, not a lay committee applying an undefined statutory standard.[40] Whatever the merits of that specific alternative, the point for this paper is narrower and harder to dispute: the body

[34]Kenya Wildlife Service, 'HWC Victims Receive Sh500M Compensation' https://www.kws.go.ke/article/hwc-victims-receive-sh500m-compensation; Kenya Wildlife Service, report on human-wildlife conflict compensation payments in Elgeyio Marakwet County https://www.kws.go.ke/article/victims-hwc-elgeyio-marakwet-paid-sh-28m-compensation.

[35]Wildlife Conservation and Management Act 2013, s 18(1)(a), as amended by the Wildlife Conservation and Management (Amendment) Act 2025 (Act No. 24 of 2025), s 2 https://new.kenyalaw.org/akn/ke/act/2013/47/eng@2025-11-04.

[36]Wildlife Conservation and Management Act 2013, s 18 (2025 text), compared against s 18 (2014 text) (n 35).

[37]Wildlife Conservation and Management Act 2013, s 18(1)(b)–(f) (2025 text) https://new.kenyalaw.org/akn/ke/act/2013/47/eng@2025-11-04.

[38]Wildlife Conservation and Management Act 2013, s 18(2)– (3), as amended by Act No. 24 of 2025, s 2 (n 37); compare the absence of any equivalent provision in the original 2013 text (n 35).

[39]Ministry of Tourism and Wildlife, Report of the Task Force on Human-Wildlife Conflict Compensation Schemes in Kenya (Final Report, July 2020) 43 (Proposed Amendment vii) https://www.tourism.go.ke/wp-content/uploads/2020/07/Task-Force-on-Human-Wildlife-Conflict-Compesation-Schemes-Final-Report.pdf.

[40]Taskforce Report 38–40 (Governance Structure).

Parliament and the Ministry themselves commissioned to study this exact problem concluded, five years before the 2025 amendment, that the committee structure was itself the obstacle, not merely who happened to sit on it. When Parliament finally did legislate on the committee in November 2025, it kept the very structure its own taskforce had recommended scrapping and changed only the membership.

Put the three findings side by side, and the timing does the arguing for you. Section 25(5) asks a committee to judge whether a farmer's land use is compatible with an "ecosystem-based management plan" that this paper has already shown is barely defined and, as far as public records show, has never actually been produced for the land in question. In November 2025 with a Sh3.5 billion compensation backlog already in front of Parliament's own Public Accounts Committee,[41] and five years after the government's own experts recommended abolishing the committee entirely the body answering that question lost the two members most likely to know what an ecosystem-based management plan should even look like, kept a structure its own taskforce had said should not exist and was simultaneously told it may meet as few as four times a year to clear a crisis measured in years and billions of shillings.

If a farmer's claim is refused tomorrow for incompatibility with a plan nobody can produce, who, exactly, on that committee, is now equipped to explain why?

3.3 The promise without a purse

Section 24(b) of the Act does not leave the compensation scheme's funding to Treasury's goodwill alone. It requires the Cabinet Secretary responsible for finance to establish an insurance scheme as a second, independent pillar of funding, one that would not have to compete, year after year, against roads and hospitals for the same shrinking budget line.[42] Twelve years later, that insurance scheme does not appear to have ever been completed.

The trail is not hidden; it is simply strung out across more than half a decade of the government's own statements, each one promising the next stage is coming. The taskforce Parliament and the Ministry commissioned to design this scheme was appointed on 14 June 2019, following a national consultative forum the previous month and it delivered its final report in July 2020 complete with a proposed product, pricing, governance structure and an implementation timeline that targeted piloting by August 2020 and full national rollout by July 2021.[43] Kenya Wildlife Service's own account, previewed at a December 2019 event, still described the insurance scheme as being operationalized, pending that same taskforce's findings.[44] July 2021 came and went without a national

[41]'MPs Decry Delays in Human–Wildlife Conflict Payouts as Thousands Await Justice' Capital FM Kenya (7 November 2025) https://www.capitalfm.co.ke/news/2025/11/mps-decry-delays-in-human-wildlife-conflict-payouts-as-thousands-await-justice/; corroborated independently by 'Paralysis: Why It Takes Up to 10 Years for Victims of Wildlife Conflict to Be Compensated' Daily Nation (13 November 2025) https://nation.africa/kenya/news/paralysis-why-it-takes-up-to-10-years-for-victims-of-wildlife-conflict-to-be-compensated-5262796 and 'MPs Raise Red Flag as Wildlife Compensation Claims Backlog Hits Sh3.5b' The Standard (8 November 2025) https://www.standardmedia.co.ke/national/article/2001533730/mps-raise-red-flag-as-wildlife-compensation-claims-backlog-hits-sh35b.

[42]Wildlife Conservation and Management Act 2013, s 24(b).

[43]Kenya Wildlife Service, 'Human Wildlife Compensation Report (2014–2017) Launched' https://www.kws.go.ke/article/human-wildlife-compensation-report-2014-2017-launched (Cabinet Secretary Najib Balala and Principal Secretary Prof Fred Segor, 3 December 2019); 'Roundup: Kenya Mulls Human-Wildlife Conflict Compensation Insurance Scheme' Xinhua (4 December 2019) http://www.xinhuanet.com/english/2019-12/04/c_138603358.htm; Taskforce Report vii, confirming the taskforce's own appointment by the Cabinet Secretary on 14 June 2019, following a national consultative forum on 15 May 2019.

[44]Taskforce Report.

rollout. It was not until May 2023 nearly two years after the taskforce's own target date that the government announced it would, in fact, pilot the scheme later that year.[45] In 2024, the Ministry, working with Kenya Wildlife Service and conservation partners, finally launched that pilot and disclosed that the compensation programme would, going forward, be administered not by government alone but by a private consortium of claims administrators AB Entheos, Minet Kenya and Pula Advisors covering six pilot counties: Kajiado, Taita Taveta, Meru, Laikipia, Narok and Baringo.[46]

By May 2025, President Ruto was telling the country, from Meru National Park itself, that the era of eight-year waits was over the scheme had migrated from a manual to a digital payment platform and 950 million shillings in a third phase of payments would follow.[47] He also launched something else that day, the Wildlife Conservation Prepaid Card a co-branded bank card, developed with Kenya Commercial Bank, that channels a portion of ordinary retail purchases directly into the Wildlife Trust Fund.[48] It is worth being precise about what this is and is not. It is a consumer fundraising product, not the insurance scheme section 24(b) requires and conflating the two would credit the law with having finally done something it has not yet done.

The same digital pilot programme became the subject of a parliamentary inquiry. The National Assembly's Committee on Tourism and Wildlife, reviewing the State Department for Wildlife's 2026/27 budget estimates, established that of the 800 million shillings allocated to the digital compensation pilot across 2023/24, 2024/25 and 2025/26, some 300 million shillings more than a third had gone to the private firm that built the digital system, as a consultancy fee, leaving 500 million shillings for the victims the money was meant to reach.[49] Committee chairperson Kareke Mbiuki asked officials, on the record, what services could possibly be worth 300 million shillings and directed a special audit into the expenditure.[50] The same budget review disclosed that the department's pending compensation bills stood at 1.1 billion shillings as of that hearing[51] a smaller, more current figure than the 3.5 billion shilling backlog reported to a different committee six months earlier.[52]

Put plainly twelve years after Parliament first required a dedicated, insurance-backed funding pillar so this scheme would not have to depend on the ordinary vagaries of annual budgeting, no such pillar has been completed and the closest thing Kenya has built in its place, a technology-driven alternative administered by private

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[45] International Institute for Environment and Development (IIED), 'Insurance to Promote Human-Wildlife Coexistence' (October 2023).

[46] 'Gov't to Implement Compensation Scheme Technology to Tackle Wildlife Attack around Wildlife Corridors' Kenya News Agency https://www.kenyanews.go.ke/govt-to-implement-compensation-scheme-technology-to-tackle-wildlife-attack-around-wildlife-corridors/.

[47] 'Ruto Launches Sh950m Compensation for Victims of Human-Wildlife Conflict' The Standard (26 May 2025) https://www.standardmedia.co.ke/national/article/2001520108/ruto-launches-sh950m-compensation-for-victims-of-human-wildlife-conflict https://english.news.cn/africa/20250527/b51015e18cb94d57a4a12b017d3009d3/c.html.

[48] New Tool to Streamline Compensation for Human-Wildlife Conflict' Capital Business (27 May 2025) <https://capitalfm.co.ke>; 'New tool to streamline compensation for human-wildlife conflict' Xinhua (27 May 2025).

[49] 'Wildlife PS Under Fire Over Sh300m Compensation Cash Diversion' Daily Nation (15 May 2026) https://nation.africa/kenya/news/ps-under-fire-over-sh300m-wildlife-compensation-cash-diversion--5461008; 'MPs Question Ksh300M Consultancy Fee in Wildlife Victim Compensation Programme' People Daily (13 May 2026) https://peopledaily.digital/news/mps-question-ksh300m-consultancy-fee-in-wildlife-victim-compensation-programme.

[50] Daily Nation (n 51); 'MPs Question Sh300m Spent on Consultancy in Wildlife Conflict Compensation Scheme' The Standard (26 May 2026) https://www.standardmedia.co.ke/national/article/2001548697/mps-question-sh300m-consultancy-costs-in-wildlife-compensation-scheme.

[51] People Daily.

[52] Wildlife PS Under Fire Over Sh300m Compensation Cash Diversion' Daily Nation (15 May 2026) <https://nation.africa>; compared against 'MPs Decry Delays in Human–Wildlife Conflict Payouts as Thousands Await Justice' Capital FM Kenya (7 November 2025) <https://capitalfm.co.ke>.

contractors, is now itself under parliamentary investigation for where more than a third of its funding actually went. This is not a scheme starved of political attention. Presidents have launched it from national parks, cabinet secretaries have staked their credibility on its reform. What it has been starved of, consistently, across three different funding experiments spanning more than a decade, is a mechanism that reliably turns money allocated into money paid.

That inquiry has not stopped the payments themselves. On 26 June 2026 while the special audit into the Sh300 million consultancy fee was still pending the department disbursed a further Sh49.8 million to 187 victims at a ceremony in Kimana, Kajiado County to mitigate conflict impacts and restore local livelihoods.[53] At a separate ceremony in the same county, Principal Secretary Museiya offered her own year-by-year account of national disbursement 908 million shillings released in 2023, 960 million in 2024 and 1.95 billion in 2025 while acknowledging, in the same breath, that the amount was not enough given the department's outstanding pending bills.[54] The scheme, in other words, is neither dead nor fixed. It continues to pay real people real money, in public, roughly on schedule with its own announcements just not reliably, not quickly and, as the Sh300 million consultancy question shows, not always transparently.

4. The human and institutional cost

Numbers alone can make a crisis feel abstract. Kenya's own figures for the scale of what this compensation regime is meant to cover leave little room for that comfort. In one government accounting of claims for the 2014–2023 period, 1,071 people died in wildlife attacks between 2014 and 2020 alone, with a further 218 killed in the 2022/2023 period deaths the state itself has tallied, in shillings, at some 5.6 billion for that first group and 1.6 billion for the second, against a headline compensation plan for the period valued at roughly 14 billion shillings in total.[55] Behind every one of those figures is a specific person, a specific committee meeting that did or did not happen and this paper has found an increasingly well-worn path to the High Court simply to make the system act.

This paper has identified more judicial review cases against Kenya Wildlife Service on this exact pattern than could be fully catalogued within its scope, a body of litigation large enough that one High Court ruling casually cites three or four others as settled background, the way a family law judgment might cite a well-known custody precedent.[56] Five of these cases this paper has read in full, and their facts, read together, describe a system that fails in more than one way at once.

Delay before any decision at all. Guyo Kuri Fugicha was attacked by an elephant in Meru County in September 2022 by August 2025, nearly three years later, the compensation committee had not even deliberated on his claim and he was forced to seek a court order simply compelling it to do so.[57] Hassan Kuno Jala's estate faced the same wall after he was killed by a buffalo

[53] Govt Pays Out Sh 49.8 Million To 187 Human-Wildlife Conflict Victims in Kajiado' Capital FM Kenya (26 June 2026) <https://capitalfm.co.ke>.
[54] 'Human-Wildlife Conflict Victims Get Compensation' Kenya News Agency https://www.kenyanews.go.ke/human-wildlife-conflict-victims-get-compensation/.
[55] 'Inside State's Sh14bn Human-Wildlife Conflict Compensation Plan' Daily Nation (13 April 2024) https://nation.africa/kenya/news/inside-state-s-sh14bn-human-wildlife-conflict-compensation-plan-4593656.
[56] *Republic v Kenya Wildlife Service & 2 others; Oketch (Suing as the Legal Representative of the Estate of Ebennezar Onyango Oketch – Deceased) (Ex parte Applicant)* (Judicial Review E010 of 2024) [2026] KEHC 4164 (KLR) (13 March 2026); *Republic v Kenya Wildlife Service & 3 others* (Judicial Review E006 of 2024) [2025] KEHC 14189 (KLR) (3 October 2025).
[57] *Fugicha* (n 8).

in the same county three and a half years after his death, no decision had been made and his family, too, needed the High Court's intervention before the committee would act at all.[58]

Delay after approval, sometimes for years. A minor, injured by a hippopotamus in Homa Bay County in January 2019, had her claim approved for the statutory maximum but the High Court itself recorded, in February 2026, that she had waited six years for money the state had already agreed was hers.[59] Samuel Muhia's claim, arising from a hyena attack, was approved at five million shillings in February 2021 by the time he obtained a mandamus order in July 2024, more than three years had passed and Kenya Wildlife Service had argued, unsuccessfully, that responsibility for payment lay with the Cabinet Secretary rather than itself.[60]

Delay stretched across most of a decade. Elizabeth Kiwekwe Kamanza died after a snake bite at her home in Garissa County on 24 June 2017. Her claim was not approved until 22 November 2022 five years later and remained unpaid a further three and a half years after that, until a High Court order in May 2026 finally compelled Kenya Wildlife Service and the Cabinet Secretary, jointly, to pay her estate the five million shillings it had already agreed was owed.[61] Nine years passed between her death and that order.

Delay compounded by outright administrative error. A.H.M. was four years old when he was bitten by a snake in Kubihalo, Mandera County, in June 2020. The Ministerial Wildlife Compensation Management Committee approved 1.5 million shillings for his care but his family received only 730,000 shillings investigation later established that the remaining 770,000 shillings had been mistakenly paid out to an entirely different claimant, whose own case had already been fully settled.[62] It took an inquiry by Kenya's Commission on Administrative Justice the Ombudsman, a different institution entirely from the courts every other case in this section had to turn to before the misdirected funds were recovered and the family finally received their balance in June 2026, six years after the bite. His father described what pursuing it actually cost him in the meantime repeated trips from Mandera to Nairobi, weeks spent in hotels chasing a ministry that had already agreed what it owed, on top of his son's ongoing medical needs.[63]

A defence the courts have already rejected, in writing, repeatedly and it keeps being raised anyway. In Elizabeth Kamanza's case, as in others, Kenya Wildlife Service argued that it was the Cabinet Secretary, not the Service, who bore responsibility for actually disbursing the money. The High Court did not need to reason this through from first principles it simply pointed to the Court of Appeal's own 2017 decision in Kenya Wildlife Service v Joseph Musyoki Kalonzo, which had already held that neither the court nor the parties should concern themselves with the internal arrangements of who within government actually disburses the funds and that any dispute between the Service and the Cabinet Secretary should not be

[58] *Gufu* (n 7).
[59] *COT* (n 1).
[60] *Muhia* (n 6).
[61] *Republic v Kenya Wildlife Service & another; Mwambegu (Suing as the Legal Representative and Administrator of the Estate of Elizabeth Kiwekwe Kamanza) (Ex parte Applicant)* (Miscellaneous Judicial Review E004 of 2026) [2026] KEHC 7217 (KLR) (22 May 2026).
[62] 'Ombudsman Secures KSh770,000 Wildlife Payout After Four-Year Delay' (Dawan Africa, 23 June 2026) https://www.dawan.africa/news/ombudsman-secures-ksh770000-wildlife-payout-after-four-year-delay.
[63] ibid.

used to deny a party compensation duly owed to it.[64] That is not a new legal question the courts are still working through. It was settled by Kenya's second-highest court in 2017 nearly a decade ago and Kenya Wildlife Service has continued to raise the identical, already-rejected argument case after case since, evidently because doing so costs it nothing and buys another round of delay.

What six verified cases and a much longer visible pattern of litigation make clear is that no single point of failure explains this crisis. It is not only that section 25(5)'s exclusion is undefined, though it is. It is not only that the committees applying it have been weakened, though they have. It is not only that the scheme's promised second funding pillar was never built, though it wasn't. It is that all three failures sit on top of a further, more basic one even where none of that is in dispute where a claim is approved, uncontested and the amount agreed Kenya's compensation regime still routinely fails to convert that agreement into an actual payment reaching the actual right person, for years at a stretch, until a court or, in at least one case, the Ombudsman is asked to force the issue. A scheme that requires outside institutions to enforce its own undisputed admissions is not, in any meaningful sense, functioning as compensation. It is functioning as litigation, and complaint-handling, with extra steps.

5. Comparative perspective

This section draws on the international academic and policy literature on human-wildlife conflict compensation, which is itself substantial one biodiversity finance review counts more than 140 distinct compensation and insurance schemes worldwide, having paid out over US$250 million in the last four decades.[65] With that said, three comparators speak directly to what this paper has found wrong in Kenya and each one complicates a tempting but too-simple fix.

Namibia shows a phased transition is possible and that it takes years, not a single announcement. Namibia's earlier Human Wildlife Self Reliance Scheme a community-administered, NGO-supported compensation fund, distinct from a state insurance product has, over a documented multi-year process, been in transition toward a government-backed insurance scheme intended to eventually replace it, with funds routed either through a licensed insurer or a dedicated conflict fund.[66] Kenya's own taskforce process (2019–2020) followed a broadly similar logic on paper. What Namibia's experience underscores is that this kind of transition is a multi-year institutional undertaking with its own real risk of stalling, not evidence that Kenya's twelve-year delay is unusually severe by international standards, but not an excuse for it either.

China's Yunnan Province shows that building the insurance scheme is not, by itself, the fix. Since 2007, Yunnan has run an actual, operating, insurance-administered compensation scheme for human-elephant conflict precisely the kind of product Kenya's own 2020 Taskforce recommended and Kenya has still not fully built.[67] Peer-

[64] *Mwambegu (n 63), citing Kenya Wildlife Service v Joseph Musyoki Kalonzo* [2017] KECA 234 (KLR).
[65] 'Ensuring Nature Positive Insurance' BIOFIN (UNDP Biodiversity Finance Initiative) https://www.biofin.org/news-and-media/ensuring-nature-positive-insurance.
[66] O Wilson-Holt and P Steele, 'Human-Wildlife Conflict and Insurance: Can Insurance Reduce the Costs of Living with Wildlife?' (IIED, 2019) https://www.iied.org/sites/default/files/pdfs/migrate/16648IIED.pdf.
[67] Shu Chen, Zhuang-Fang Yi, Ahimsa Campos-Arceiz, Ming-Yong Chen and Edward L Webb, 'Developing a Spatially-Explicit, Sustainable and Risk-Based Insurance Scheme to Mitigate Human-Wildlife Conflict' (2013) 168 Biological Conservation 31, DOI: 10.1016/j.biocon.2013.09.017; on the scheme's operation since 2007, see also 'Patterns of Human-Wildlife Conflict and Compensation Practices around Daxueshan Nature Reserve, China' https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6085767/.

reviewed research on that scheme, nearly two decades into its operation, has documented exactly the failure modes this paper has found in Kenya's non-insurance-based system: chronic funding shortfalls, payouts set so low they bear little relation to actual loss compensation of US$2 per rubber tree destroyed, regardless of the tree's age or productivity and limited involvement of the affected communities in how the scheme is actually run.[68] The lesson is not that insurance schemes fail. It is that an insurance scheme inherits the same political and fiscal discipline problems as any other funding mechanism if that discipline isn't built into its design; the label insurance does not, by itself, manufacture the reliability Kenya's compensation fund has never had.

Alberta, Canada shows reliable funding is achievable without insurance at all, if the government simply commits to paying. Alberta's provincial wildlife predator compensation programme is funded directly by the government, requires no premium from producers and has operated as a straightforward budget-line commitment.[69] This is the simplest comparator in this section and perhaps the most quietly damning one for Kenya: it demonstrates that a functioning compensation scheme does not strictly require the insurance architecture Kenya has spent twelve years failing to build. It requires a government that reliably pays what it has agreed to pay the one ingredient no funding model can substitute for and the one this paper has found missing in Kenya regardless of which funding mechanism has been tried.

One further point from this literature deserves to be stated plainly, because it is not this paper's own opinion it is a recognised, cross-national finding. A synthesis of successful and unsuccessful compensation schemes worldwide identifies clear rules and guidelines as one of the specific, named success criteria separating schemes that maintain community trust from schemes that do not, precisely because low awareness of a scheme's actual criteria among the people it is meant to serve is a documented driver of failure. Section 3.1 of this paper found that Kenya's own compensation-denial standard is not merely unclear to the communities it governs it is undefined in the regulations, unwritten by the agency responsible for writing it. Kenya is not failing at an unusually hard problem other countries have solved. It is failing at the specific, well-documented and avoidable part of the problem that comparative experience already says matters most.

6. A practical path to reform

Each recommendation below is tied to a specific gap this paper has identified, not offered as a general call for more funding or better enforcement. Two of them can be achieved by regulation alone, without waiting for Parliament and a third splits cleanly across both tracks one-part regulation can deliver on its own, one part that needs an amendment Act. None of them is invented from nothing each borrows either from an instrument Kenya has already drafted, a body Kenya has already

[68]Long-Ying Wen and others, 'Satisfaction of Households in Surrounding Communities of Protected Areas with Economic Compensation for Wildlife Accidents: A Case Study of Xishuangbanna National Nature Reserve in China' (2024) 6(1) Forestry Economics Review 22, doi.org; https://www.academia.edu/130150612/

[69]Human-Wildlife Conflict Task Force, 'Compensation & Other Financial Instruments' https://www.hwctf.org/compensation citing the Alberta, Canada wildlife predator compensation programme as a government-funded, no-premium model; see also the case study summary in 'Human Wildlife Conflict Mitigation: Lessons Learned from Global Compensation and Insurance Schemes' https://www.researchgate.net/publication/349758004_Human_Wildlife_Conflict_Mitigation_Lessons_learned_from_global_compensation_and_insurance_schemes.

commissioned, or a lesson Section 5 has already drawn from elsewhere.

a. Closure of the undefined exclusion, or a moratorium on its use.

Section 3.1 found that section 25(5)'s ecosystem-based management plan ground has no regulatory content and, on this paper's own search, no plan to point to. The Cabinet Secretary already has the power to fix half of this by regulation alone: section 25(7) permits regulations defining the standard, the same power already used in 2017 to partially define reasonable measures.[70] Two honest options follow from this paper's own findings. Either the Cabinet Secretary gazettes a regulation defining what an ecosystem-based management plan is, who must produce it and what compatibility means, with a fixed deadline or until that happens, the ground should not be available to deny a claim at all, since this paper has found no evidence the plans it depends on exist. A right to compensation should not be defeated by a document nobody can produce.

b. Restoration of the expertise Parliament removed and let the committee actually meet.

Section 3.2 found that the November 2025 amendment removed the land use planning officer and county environment officer from standing committee membership and capped meetings at four a year. Both changes can be reversed by ordinary amendment and neither requires new spending it requires reinstating two positions that already existed in the original 2013 Act and lifting a cap that did not exist before 2025 at all.[71] This paper takes no firm position on whether Kenya should go further and adopt the 2020 Taskforce's own recommendation to abolish the committee structure entirely in favour of insurance-administered claims processing that is a larger institutional question this paper has not independently evaluated in full. What this paper does say plainly is that the recommendation exists, was produced by the government's own commissioned experts and was never seriously taken up. At minimum, it deserves a considered answer from Parliament, not silent abandonment.

c. Finish what has already been started.

Section 3.3 traced a funding pillar that has been about to launch since 2019, missed its own 2021 target, restarted in 2023 and is now, in its actual pilot form, under a parliamentary audit over consultancy costs. Section 5's comparative lesson bears directly here: Alberta's experience shows that insurance is not the only route to reliable funding and Yunnan's experience shows that insurance is not, by itself, a guarantee of one. Kenya does not need a fourth funding experiment. It needs the special audit ordered in May 2026 completed and published, its findings acted on rather than shelved and a deadline with a number attached to it, not another ministerial announcement. This paper proposes twelve months from the audit's publication for government to notify Parliament, in writing, which of two paths it is taking national rollout of the existing pilot, or a clearly costed, directly government-funded alternative. If national rollout is chosen, a further eighteen months should be fixed for the pilot currently confined to six counties to reach the remaining forty-one, with a minimum

[70] Wildlife Conservation and Management Act 2013, s 25(7).

[71] Wildlife Conservation and Management Act 2013, s 18 (2014 text) (n 35), compared against s 18 (2025 text).

number of additional counties written into the regulations for each year of that window missing an annual milestone should trigger automatic reversion to the government-funded alternative, not a quiet extension. Eighteen months is not a number picked at random it tracks what the taskforce's own 2020 report treated as realistic when it set a pilot-to-national gap of under a year, scaled up modestly for a starting base four years further along than the one that report worked from. Given that the taskforce's own 2021 rollout target was missed by more than two years before anyone was required to explain why, this paper's recommendation is not merely set a deadline, but that the deadline carry a consequence for missing it, written into the regulations themselves, not left as a press statement a minister can quietly let pass.

d. Making non-payment costs the state

something, the way Kenya has already proposed doing for private suppliers. Section 4 found that even fully approved, undisputed compensation claims routinely go unpaid for years and that Kenya Wildlife Service continues to raise a blame the Cabinet Secretary defence the Court of Appeal rejected as far back as 2017.[72] Kenya does not need to invent a solution to this from scratch. The Prompt Payment Bill first proposed in 2020, revised in 2021 and 2022 and, as of early 2026, still awaiting presidential assent after passing the Senate already establishes the precise mechanism this paper would recommend for wildlife compensation specifically a fixed payment deadline, automatic interest calculated at the Central Bank base rate for late payment and personal offence liability for an accounting officer who fails to pay without reasonable cause.[73] This paper recommends Parliament apply that same model, by name, to compensation approved under this Act with a single further fix the Prompt Payment Bill does not need to make for itself an express statutory designation of exactly one accounting officer with a non-delegable duty to pay, closing off the which arm of government is responsible argument this paper has found Kenya Wildlife Service raising and losing, for nearly a decade. It is worth being honest about what this comparison also reveals: The Prompt Payment Bill itself has now sat unenacted for more than five years, passed by one house and never assented into law and that history is a reason to stop waiting on it, not a reason to borrow its language and wait again. The practical fix is to treat the Bill as a template rather than a precondition: Parliament should write the fixed deadline and automatic interest provisions directly into section 25 of this Act, or into regulations under section 25(7), rather than making wildlife compensation claimants wait on a general Bill whose five-year delay has had nothing to do with wildlife, wildlife victims, or Kenya Wildlife Service at all. Not every piece of this recommendation can travel that faster route personal offence liability is ordinarily a matter for the principal Act rather than subsidiary legislation, so that element most likely needs an amendment Bill of its own. The deadline-and-interest regime does not share that constraint it requires nothing more than the same regulation-making power this paper's first recommendation already invokes. Kenya does not need

[72] *Mwambegu* (n 61).

[73] The Prompt Payment Bill, 2021 (Senate Bills No. 16 of 2021)10 https://www.parliament.go.ke/sites/default/files/2021-04/Prompt%20Payment%20Bill%20No.%2016%20of%202021.pdf accessed 6 July 2026; on its legislative history and current unenacted status as of early 2026, see 'Kenya Payment Terms' Taulia https://taulia.com/payment-terms/kenya/ accessed 6 July 2026, reporting that a 2022 version of the Bill passed the Senate and was referred to the National Assembly but "has not received presidential assent as of early 2026" and "remains pending."

the general Prompt Payment Bill to pass before wildlife compensation claimants start earning interest on money the state has already agreed is theirs; it needs the Cabinet Secretary to stop waiting for it. It is this paper's way of saying, plainly, that the obstacle was never a shortage of good ideas only a habit of parking sector-specific fixes behind general legislation that never arrives.

Conclusion

Deni halilali. A debt does not sleep. This paper opened with that saying because it captures, in four words, what should be true of a promise a state writes into its own statute books. It does not appear to be true of Kenya's wildlife compensation scheme.

This paper has traced that failure to four distinct, precisely locatable points, not to a vague sense that the system is broken. Section 25(5) conditions a farmer's compensation on compatibility with an ecosystem-based management plan that this paper's own research could not find, produced by the one agency the Act says must produce it. The committees built to apply that standard were, in November 2025, stripped of the two members most likely to understand it, capped in how often they may meet, and left exactly as the government's own 2020 Taskforce had recommended, they should not be left unreformed. The insurance-based funding pillar Parliament required in 2013 remains, by this paper's own tracing of a decade of government statements, unfinished, its most recent incarnation now under parliamentary audit for where a third of its money actually went. Underneath all three of those findings sits a fourth, uncovered not in the statute but in the case law and, in one instance, in an Ombudsman's file even when none of this is contested when a claim has been verified, approved and its amount agreed by the state's own committee Kenya's compensation regime has repeatedly required a lawsuit, or a formal complaint to a constitutional office, before the money it already owed actually reached the person it was owed to.

This paper has tried to hold itself to the same standard it applies to the law it examines. That is not a stylistic choice. It is the only honest way to write about a system whose central failure is the gap between what is claimed and what is actually delivered. None of the six people at the centre of this paper's evidence set out to become a case study in administrative law. A child went to fetch water. A man walked past an elephant's path. A woman was bitten by a snake at her own home. Each of them was owed money the state had already agreed was theirs, under a law Parliament wrote with real ambition thirteen years ago. What this paper has tried to show is that the distance between that ambition and what those six people actually experienced is not an accident and not simply a matter of Kenya needing more money. It is the predictable result of an undefined standard, a weakened institution, an unfinished promise and a payment system that answers only to those with the resources to sue or complain. Closing that distance does not require Kenya to invent anything it does not already have. It requires only that the state finally do, without being taken to court or to the Ombudsman first, what its own law has said all along that it owes.

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The M-KOPA playbook: How one lender outlasted an entire industry lessons in strategy, risk and execution

By Adonijah Otieno Ogara

Kenya has earned global recognition as a laboratory for financial innovation. From mobile money to digital credit, the country has repeatedly shown that technology can expand financial inclusion. Yet the same market has also buried several once promising consumer finance and Pay-as-You-Go (PAYGO) businesses, through collapse, restructuring, or slow decline.

So here is the question worth sitting with: why has M-KOPA kept growing while so many comparable businesses have struggled?

It's tempting to reach for easy answers like luck, marketing muscle, or political cover. I don't buy any of them. What M-KOPA has actually built is a business that fuses technology, disciplined credit management, operational excellence, and a genuine read on the realities facing low-income households. That combination, not fortune, is the story.

Start with the obvious point that gets missed too often. M-KOPA is not really in the business of selling phones, solar systems, or electric motorcycles. It is in the business of managing credit risk. Every financed device is a lending decision wearing a retail disguise. And because the company has been doing this for over a decade, it has accumulated repayment data that most newer entrants simply don't have. In lending, memory is an asset.

Then there's the way it has used technology, not just to sign customers up, but to keep losses down. Financed devices can be managed remotely when payments fall behind, which nudges borrowers to stay current and caps the company's downside. It's a form of security most traditional lenders can only dream of.

Scale does the rest of the heavy lifting. Serving millions of customers justifies spending on data science, fraud detection, customer service, and collections, investments that would bankrupt a smaller rival trying to copy them. Given enough time, that kind of infrastructure stops being an advantage and starts being a moat.

Add to this a willingness to evolve. M-KOPA didn't stay a solar company. It moved into smartphones, digital financial services, insurance, and electric mobility, spreading its risk across products instead of betting the business on one. Diversification, done deliberately, is a form of survival strategy.

None of this happened in a vacuum, and it would be dishonest to pretend Kenya's environment didn't help. Widespread

M-KOPA began with pay-as-you-go solar but has evolved into a much broader fintech and asset-financing platform covering smartphones, digital loans, insurance and electric motorcycles. Its model allows customers to make a relatively small upfront payment and then repay in small daily, weekly or monthly instalments. Crucially, customers do not need conventional collateral, guarantors or formal credit scores.

mobile money adoption, rising smartphone penetration, and a regulatory climate generally friendly to digital finance all created room for these business models to grow. But here's the thing. Every one of M-KOPA's fallen competitors had access to the same conditions. What separated the survivors from the casualties was execution, plain and simple.

I know there's a school of thought that says M-KOPA must have hidden political advantages. How else does one company keep standing while others fall? I understand the instinct, but it's speculation dressed up as analysis. Large fintechs inevitably deal with regulators, licensing regimes, and shifting policy. That's just the cost of scale. It shouldn't be confused with favouritism, absent actual evidence of it.

The lesson here travels well beyond one company. African entrepreneurs chasing growth would do well to notice that survival rarely comes from aggressive expansion alone. It comes from understanding your customers, managing risk with discipline, investing in data, building operations that can take a hit, and adapting continuously rather than defensively.

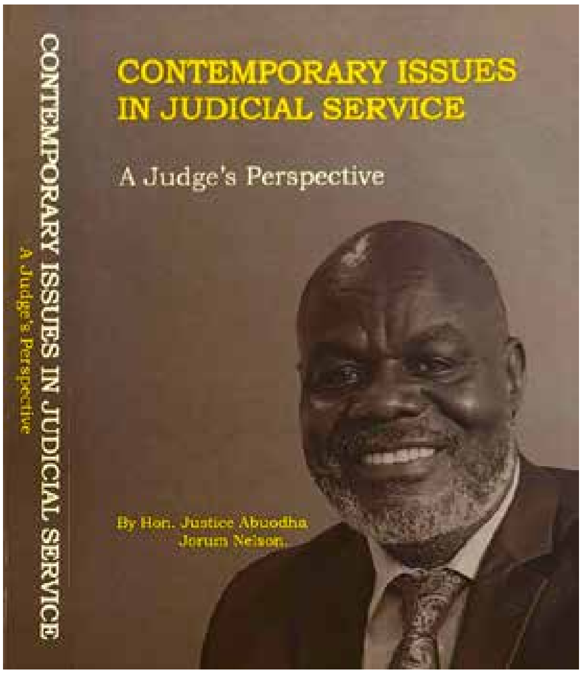
M-KOPA's journey is a useful reminder that in Africa, innovation is only ever the opening move. The companies that last are the ones that turn innovation into disciplined execution, and keep doing it long after the novelty has worn off.

As Kenya continues shaping the future of digital finance, the businesses that endure won't necessarily be the ones making the boldest promises. They'll be the ones with the strongest systems, the clearest eyed view of risk, and the patience to build institutions instead of chasing headlines.

Adonijah Otieno Ogara is a writer on strategy, engineering, and innovation.

Book review: Contemporary issues in judicial service – A Judge's perspective by Justice Nelson Abuodha

By Evans O. Ogada



Justice Nelson Abuodha's *Contemporary Issues in Judicial Service – A Judge's Perspective* is a work of considerable intellectual distinction. It is at once a judicial memoir of ideas, a legal meditation, and an incisive commentary on the contemporary administration of justice. The book does not merely discourse upon law; it interrogates the institution of judging, its frailties, its constitutional obligations and, occasionally, its rather uncomfortable human dimensions. It is, in the best sense, a book written by a jurist who has inhabited the judicial world and therefore understands both its lofty aspirations and its subterranean anxieties.

The work is well written, erudite, crisp and intellectually astute. Its greatest virtue perhaps lies in its economy. Justice Abuodha does not succumb to the temptation, common in legal writing, of burying a proposition beneath a sepulchre of words. His prose is disciplined, purposeful and occasionally aphoristic. The chapters are sufficiently compact to invite reading but sufficiently profound to compel reflection. There is, moreover, a pleasing historical consciousness running through the work. The author understands that contemporary judicial controversies did not spring, Minerva-like, fully armed from the head of the Constitution; they have antecedents, institutional genealogies and intellectual pedigrees.

The opening chapter, "Judicial Corruption: Real or Perceptive?", immediately announces the book's intellectual ambition. Rather than treating judicial corruption as an uncomplicated proposition, the chapter interrogates the distinction between corruption as an empirical reality and corruption as a public perception. This is a particularly important inquiry in an age in which institutional legitimacy is often determined not merely by what courts do, but by what the public believes courts are doing. The author is alive to the proposition that perception may itself have constitutional consequences: a judiciary whose integrity is doubted may possess legal authority while gradually forfeiting moral authority. The discussion is therefore not merely about venality; it is about trust, legitimacy and the social compact upon which adjudication ultimately rests.

The second chapter, "The Bar and Judicial Corruption," is equally arresting. It refuses to treat corruption as a pathology peculiar to the Bench. The relationship between the Bar and the Bench is presented as symbiotic, and consequently the ethical failures of one may be nourished, tolerated or facilitated by the other. This is a salutary reminder that judicial integrity cannot be constructed exclusively through disciplinary proceedings against judges. The legal profession itself must examine the culture, incentives and practices that surround adjudication. There is something almost Victorian in the moral seriousness of this proposition: institutions, like gentlemen, are judged not merely by their proclamations but by their conduct.

Chapter Three, "The Concept of Jurisprudence and the Jurisdiction Question," moves the reader from institutional ethics into jurisprudential territory. Here the author demonstrates that jurisdiction is not a mere procedural technicality but a foundational question concerning the authority of courts to pronounce upon disputes. The discussion is particularly significant within Kenya's post-2010 constitutional architecture, where the proliferation of specialised jurisdictions has generated difficult questions concerning boundaries, competence and institutional comity. The chapter possesses the rare quality of making an apparently technical subject intellectually interesting.

The chapter on Public Interest Litigation: Rationale, Extent and Scope is equally timely. Public interest litigation has become one of the principal vehicles through which constitutional rights and governmental accountability are pursued in Kenya. Justice Abuodha's treatment invites consideration of both its emancipatory potential and its limits. PIL can be a magnificent instrument of constitutional transformation, but, like every juridical instrument, it can be abused. The chapter consequently engages the perennial tension between access to justice and judicial restraint.

Chapter Five, concerning the declaration of unconstitutionality of a statute or provision thereof, is particularly important in a constitutional democracy founded upon constitutional supremacy. The judicial power to invalidate legislation is simultaneously a formidable safeguard and a delicate institutional responsibility. The chapter raises the deeper question of how courts should exercise this power without inadvertently assuming the legislative mantle. The author thus places constitutional adjudication within the broader architecture of separation of powers.

The chapter on decisional independence is perhaps among the book's most consequential contributions. Judicial independence is frequently reduced to the absence of external interference. Yet genuine independence encompasses the intellectual freedom of the judge to decide according to law, evidence, constitutional principle and conscience. The chapter therefore speaks to a fundamental truth: a judge who cannot decide independently is not truly exercising judicial power. Independence, however, cannot be divorced from accountability; the two are not mutually hostile concepts but complementary features of constitutional governance.

The treatment of reinstatement, termination of fixed-term contracts, and the right to strike brings the book firmly into the terrain of employment and labour jurisprudence. These chapters demonstrate the author's versatility and his appreciation that judicial service exists within a broader constitutional and labour-law framework. The chapter on the right to strike, provocatively subtitled "A Right or Sublime Mysticism," is particularly evocative. The phrase itself captures the author's willingness to employ wit and intellectual playfulness while addressing serious questions of law. It asks whether constitutional rights retain practical meaning when institutional realities render their exercise exceptionally difficult.

The Epilogue provides a fitting culmination of public interest litigation, constitutional invalidity, decisional independence and labour rights; the reader is left with a larger reflection on judicial service itself. The book ultimately asks what it means to be a judge in a constitutional democracy undergoing institutional transformation.

What makes the work especially compelling is its historical sensibility. Justice Abuodha writes with an awareness that legal institutions are accumulated experiences rather than pristine creations. The present judiciary bears the marks of colonial inheritance, the pre-2010 constitutional order and the transformative aspirations of the Constitution of Kenya, 2010. The result is a work that speaks simultaneously to history and to the present.

There is also a distinctly Victorian quality to the prose, not Victorian in the sense of antiquated, but in its moral gravity, formal elegance and confidence that words such as *integrity, duty, propriety, honour* and *public trust* still possess meaning. The author writes as though judicial office is not merely a profession but a solemn public vocation. That is an increasingly unfashionable proposition, and therefore perhaps an increasingly necessary one.

Perhaps the most compelling feature of the book is its refusal to romanticise the judiciary. Justice Abuodha writes from within the judicial establishment, yet he does not treat the judicial office as an enchanted citadel beyond criticism. He recognises that judges, advocates and institutions are all capable of error, prejudice, institutional inertia and, more gravely, ethical failure. This candour gives the book its intellectual credibility. There is no facile hagiography here; rather, there is an insistence that the judiciary do the inquiry. Having traversed corruption, professional ethics, jurisdiction, pu must continually subject itself to the searching light of constitutionalism. In this respect, the book is almost Socratic in temperament: it asks uncomfortable questions not for the pleasure of provocation, but because an institution entrusted with dispensing justice must first possess the courage to examine itself.

The book is also remarkable for the manner in which it brings law, history and institutional experience into conversation. The author understands that legal doctrines do not operate in a vacuum; they are shaped by political history, professional culture, institutional memory and the changing expectations of society. Kenya's constitutional transition is therefore not presented as a clean rupture with the past, but as an unfinished project in which old habits continually encounter new constitutional imperatives. This gives the work a particularly enduring quality. The questions it raises about corruption, independence, jurisdiction and constitutional adjudication are not ephemeral controversies destined to disappear with the next judicial reorganisation; they are enduring questions about the character of the Kenyan State and the place of law within it.

There is, finally, a profound constitutional morality underlying the entire enterprise. The author appears to understand that the authority of a court rests upon something more substantial than the coercive machinery of the State. A judgment commands obedience because society accepts, however imperfectly, that the judge exercises power according to law rather than personal caprice. Once that proposition is compromised—whether by corruption, interference, professional impropriety or institutional timidity—the majesty of the judicial office begins to diminish. The book therefore amounts to a quiet but powerful exhortation to preserve the dignity of adjudication. Its message is almost old-fashioned in its nobility: that public office is a trust, that judicial power is a responsibility rather than a privilege, and that the pursuit of justice demands not only intellectual brilliance but also character. In an era of institutional scepticism, that is a proposition both sublime and salutary.

Ultimately, *Contemporary Issues in Judicial Service – A Judge's Perspective* is a brilliant and intellectually assured contribution to Kenyan judicial literature. It is crisp without being superficial, erudite without being pedantic, historical without becoming antiquarian, and critical without descending into cynicism. Its greatest achievement is that it treats judicial service not as an abstraction but as a living institution populated by human beings, subject to human frailties and yet entrusted with profoundly consequential constitutional responsibilities.

It is, in short, a book of uncommon intellectual astuteness—one that deserves to be read not merely by judges and advocates, but by scholars, judicial officers, students and all who care about the fortunes of constitutionalism and the rule of law in Kenya. It is a work that does not merely describe the judiciary; it holds a mirror to it. And, in that mirror, the legal fraternity may see both the grandeur of the judicial calling and the imperfections that imperil it.

That is no mean accomplishment.

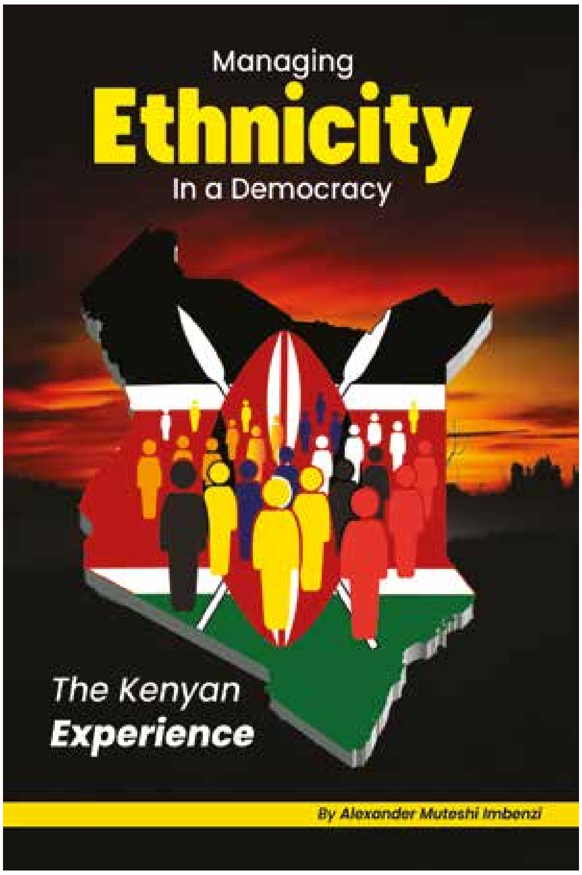
One must, therefore, extend to Justice Nelson Abuodha the warmest congratulations for producing a work of such intellectual amplitude, juridical sophistication and uncommon literary grace. *Contemporary Issues in Judicial Service – A Judge's Perspective* is not merely a book to be consulted; it is a book to be savoured, interrogated and repeatedly revisited. It deserves a place upon the desk of every judge, advocate, legal scholar, judicial officer and student who wishes to understand not only the architecture of judicial power, but also its moral foundations and institutional vicissitudes. The reader will find within its pages a felicitous marriage of learning and experience, history and doctrine, candour and conviction. I commend it, therefore, without reservation: read it slowly, read it critically, and read it with the intellectual appetite it richly deserves. For beneath its crisp chapters lies a formidable treasury of jurisprudential reflection, a work whose ideas linger long after the final page has been turned, like the last resonant note of an eloquent oration. It is, in every sense, a distinguished and compelling addition to Kenya's growing corpus of judicial scholarship, and Justice Abuodha is to be congratulated for giving the legal fraternity a work so lucid in expression, penetrating in analysis and generous in intellectual substance.

Evans Ogada is a specialist in Constitutional & Administrative Law litigation. He handled numerous cases in his practice areas, including representing the Law Society of Kenya in 2019 in a petition concerning the appointment of judges & two petitions on arbitrary arrests.

BOOK REVIEW

Counting citizens, counting communities: A review of Managing Ethnicity in a Democracy: The Kenyan Experience

By Teddy Odira



Introduction

On election day in Kenya, the ballot paper is small enough to fold into a box but the hopes packed into it are not. Each vote carries an ordinary democratic promise that citizens will count as equals. However, in a polity where many communities have learned to read state power through the lens of inclusion and exclusion, the count can begin to feel less like a civic ritual than a nerve test about who will belong securely after the numbers are announced. It is this uneasy arithmetic of democracy that Alexander Muteshi Imbenzi sets out to confront in ***Managing Ethnicity in a Democracy: The Kenyan Experience***. The subject is urgent not because ethnicity is a civic defect but because political competition can turn identity into a hard currency of fear, bargaining and access.

Imbenzi's central insistence is refreshingly plain. Ethnicity is not going away and pretending otherwise is intellectually lazy and politically dangerous. The preface states the point with admirable candour. Kenya's democracy, the book argues, has made progress but ethnicity remains a major impediment to nation-building, accountability and stable democratic competition, the task, therefore, is not denial but institutional management. That proposition gives the book its seriousness. It asks how a multi-ethnic state can honour cultural belonging without allowing public power to be captured by ethnic monopolies.

What the book argues

The architecture of the book is clear from the table of contents and the opening chapters. It moves from background and conceptual groundwork to two linked inquiries. First, how ethnicity has obstructed Kenya's transition to democracy. Second, how it has shaped that transition in practice and finally, what legal, constitutional and institutional reforms might mitigate the problem. The prefatory materials also state five objectives including to examine the centrality of ethnicity in Kenyan political mobilisation, the factors behind the ethnicisation of politics, the impact of that mobilisation on democratisation, the extent to which ethnicity has been used as a political tactic and the policies required to manage it positively.

From excerpts, the book appears to advance a broad thesis with two limbs. The first is historical and institutional. Ethnic politics in Kenya did not arise simply because communities exist but because the post-independence state concentrated power at the centre, weakened counterweights and made control of the presidency disproportionately valuable. The second is normative and programmatic because democratic competition in Kenya still often tracks ethnic blocs, the constitutional order must be redesigned so that public office, resources and legitimacy are not experienced as prizes for some communities and punishment for others.

That is not a small claim. It places the book in the company of works of political and constitutional thought rather than mere electoral commentary. Imbenzi is not simply describing tribal voting. He is trying to explain how state design, party formation, public appointments and patterns of political memory produce a democracy in which citizens may vote as Kenyans but are often asked to calculate as communities.

History, institutions and political incentives

One of the book's most persuasive contributions lies in its institutional history. The opening chapter argues that independence began under a multi-party order with quasi-federal and bicameral features, but that KANU's victory in 1963 was followed by the dissolution of KADU, the abolition of those decentralising arrangements and a series of constitutional amendments that strengthened the executive at the expense of Parliament and judicial autonomy. In the book's telling, that early concentration of authority helped create an authoritarian state and made access to the presidency the master key to appointments, resources and security.

That emphasis matters because it resists a fatalistic reading of Kenyan politics. If ethnic polarisation were simply an inheritance of ancient loyalties, then constitutional imagination would be a sideshow. Imbenzi instead suggests that institutions shape incentives and once state power is centralised, communities will rationally fear exclusion, elites will rationally mobilise those fears and elections will attract dangerous existential weight. In this respect, the book is strongest when it links ethnicity to the design of the state rather than to any myth of immutable tribal destiny.

The discussion of the repeal of section 2A and the return of multi-party politics sharpens this argument. The book contends that political liberalisation after 1991 widened democratic space without adequately reforming the constitutional order, leaving the presidency powerful, institutions weak and political parties increasingly ethnic in composition and appeal. Later chapters extend the point through the 2005 referendum, the 2007 election cycle, and the continued prominence of ethnic alignments in 2013, 2017 and 2022. Whether every historical generalisation is equally substantiated in the supplied excerpts, the analytic direction is clear and often

More than six decades after independence, ethnicity remains one of the most powerful forces shaping Kenya's politics. From electoral coalitions and access to state power to public appointments and the distribution of resources, Kenya continues to confront a fundamental democratic challenge.

convincing. Ethnicity persists because political competition still rewards its mobilisation.

The book is also alert to how grievances are institutionalised through appointments and resource distribution. Its argument that centralised power makes communities read government through the ethnicity of the president is unsettling because it rings true to much of Kenya's political experience as described in the text. The state becomes intimate to some and distant to others. That is a powerful insight. It explains why constitutional debates in Kenya so often carry more heat than technocratic language suggests. A blueprint on paper does not assemble itself into an inclusive republic any more than a flat-pack wardrobe assembles itself into furniture.

Ethnicity: Identity or political instrument?

Imbenzi's conceptual discussion is among the most interesting parts of the book. Chapter Two treats ethnicity, on the one hand, as a legitimate source of self-identification, pride, social security and mutual support. It explicitly rejects the idea that ethnic belonging is inherently pathological and it stresses cultural sharing, kinship support and the ordinary social goods of communal life. This is an important corrective in a public discourse that too often speaks as though ethnic identity were itself the crime rather than one of the raw materials of citizenship.

At the same time, the book argues that ethnic groups are historically fluid and socially constructed. Drawing on Bethwell Ogot and Marina Ottaway, it notes processes of migration, intermarriage, assimilation and porous frontiers, it also defines ethnicity, through John Sharp, as a political process by which cultural difference can be activated, and even invented, in the pursuit of political goals. Those moves place the book closer to modern social-constructionist and instrumentalist approaches than to crude primordialism, even if it still takes seriously the emotional depth of group attachment.

The theoretical survey is useful because it is explained in accessible terms. Cultural pluralism is presented as a way of understanding conflict where groups with different value systems coexist under unequal power, relative group worth explains why esteem, status and security can make ethnicity intensely felt, primordialism captures the depth of attachment, instrumentalism explains elite manipulation and rational choice illuminates why people may join ethnic political projects when the incentives favour them. The book ultimately says the relative group worth approach is the most plausible in Kenya, while also acknowledging elite instrumentalisation and fear of the state. That hybrid is sensible. Kenya's politics cannot be understood without both psychology and strategy.

Still, this section also reveals a conceptual tension. The book argues, persuasively, that ethnic identities are fluid and historically made yet elsewhere it often maps communities into fairly stable electoral blocs and sometimes writes as though communal political behaviour were more unified than the earlier theory would permit. That tension does not destroy the argument, but it does invite a harder question. When does the analysis describe the political use of ethnic identity, and when does it quietly begin to reify the very categories it has just shown to be contingent?

Questions the book leaves open

The book is strongest in diagnosis and less complete in prescription. Several questions deserve sharper development. First, the analysis does not always separate ethnic identity from ethnic entrepreneurship with enough care. At many points, politicians are shown mobilising communities through threat, prestige, appointments and bloc bargaining. Yet the book can still slide into describing communities themselves as though they act with a single mind. That risks overstating coherence and understating dissent, class division, urban pluralism and ideological variation within communities.

Second, the evidentiary architecture appears uneven. Some claims are carefully linked to scholars and historical texts, others rely on newspaper accounts, approximations, or broad assertions about how entire blocs voted. The extensive catalogue of ethnic communities and leaders is informative, but it sometimes feels closer to political ethnography than to a fully argued method. The text would be stronger if it explained more systematically how voting-bloc estimates are derived and how claims about communal behaviour are verified.

Third, some remedies are more aspirational than institutionally designed. Raising the presidential threshold from 50+1 to 65 percent, limiting parties to two or three, introducing rotational presidency, creating a parliamentary system, and allowing party-appointed IEBC commissioners are all serious proposals but the supplied chapter offers them more as directional solutions than as fully worked constitutional models. Each would raise difficult questions about feasibility, amendment pathways, minority protection, party cartelisation, and the risk of simply relocating ethnic bargaining rather than transcending it.

Fourth, the book's commitment to inclusion occasionally sits uneasily beside proposals that may harden the categories they seek to soften. If the state manages ethnicity by formally calibrating offices, coalitions and thresholds around communal arithmetic, how does it avoid freezing ethnic identities into permanent constitutional compartments? Kenya needs cross-ethnic coalition-building, it also needs a civic order in which citizenship is more than a census of anxieties. The book gestures toward that future, but it does not entirely solve the puzzle.

Fifth, the 2010 Constitution appears in the text both as a meaningful advance and as an incomplete answer. That is plausible. But the reviewable excerpts leave open an important legal question. Which reforms can be achieved within the existing constitutional framework through political practice, legislation and enforcement, and which would require major amendment and a much deeper national consensus? For lawyers and constitutional scholars, that distinction is not a footnote. It is the battlefield.

Finally, the focus on ethnicity may not always give sufficient analytical space to class, gender, generation, religion, patronage, region, urbanisation and economic inequality. The available materials show that the author knows ethnicity intersects with access to resources and state security. Even so, the argument would be richer if those other axes of exclusion were more fully integrated into the core explanatory frame rather than orbiting it from a distance.

Closing

Kenya's democracy is not weakened by the mere fact of difference. It is weakened when difference is made to decide, too often and too completely, whose turn it is to be secure, visible and heard. Imbenzi's book deserves attention because it insists that ethnicity is neither a superstition to be mocked nor a destiny to be obeyed. It is a political fact to be understood, disciplined and placed inside institutions worthy of a republic. The available text does not settle every question it raises, and some of its remedies need fuller constitutional engineering. But it performs an important civic service. It pushes the debate beyond pious appeals to unity and back to the harder work of designing a democracy in which no Kenyan's dignity depends on electoral kinship.

Kenya's politics has long been shaped by ethnic identity, regional interests and coalition-building. While ethnicity can provide communities with political representation and a sense of collective interest, it becomes problematic when access to state power, public resources and political opportunity is perceived primarily through an ethnic lens.

Verdict: A serious, accessible and often persuasive intervention that locates Kenya's ethnicised politics in the design of power rather than in cultural essence alone. Its historical framing and institutional focus are valuable, its prescriptions, though stimulating, need firmer constitutional and empirical elaboration. Scholars, lawyers, students and public-policy readers will find it worth arguing with, which is a compliment, not a caution.

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